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IN THE

Supreme Court of the United States

October Term, 1968

No. 901

ALLEN F. BARKER, *et al.*,

Petitioners,

—versus—

WENDELL G. HARDWAY, President of Bluefield State College, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROY LUCAS
20 East Ninth Street
New York, N. Y. 10003

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

HERBERT H. HENDERSON
317 Ninth Street
Huntington, West Virginia 25701

Attorneys for Petitioners

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N. Y. 10003

LEWIS M. STEEL
55 Central Park West
New York, N.Y. 10023

Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1968

No. .....

ALLEN F. BARKER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARMEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALLAN SCOTT TUCKER, Individually and in behalf of All Those Similarly Situated,

Petitioners,

—versus—

WENDELL G. HARDWAY, President of Bluefield State College; J. I. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and West Virginia State Board of Education, a Public Body Corporate,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on September 3, 1968.

Citation to Opinions Below

The Court of Appeals' per curiam opinion, affirming the decision below, is reported at 399 F. 2d 638 (4th Cir. 1968), and printed in the Appendix, *infra,* p. 1a. The opinion of the United States District Court for the Southern District of West Virginia is reported at 283 F. Supp. 228 (S. D. W. Va. 1968), and printed in the Appendix, *infra,* p. 3a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 3, 1968. Mr. Chief Justice Warren extended the time within which to file a petition for writ of certiorari to and including January 3, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

I. Whether a public institution of higher learning, consistent with the due process clause of the Fourteenth Amendment, may indefinitely expel students prior to a hearing and refuse to readmit them after offering hearings in which the students would be prejudiced by absence of the following procedural safeguards:

A. right to fair and impartial hearings in which members of the tribunals have no prior official involvement in the controversy and do not actively participate as witnesses against the students charged with misconduct;

B. right to be accompanied, advised, and represented by retained counsel;

C. right to confront and cross-examine the witnesses against them;

D. right to presumed innocence of alleged misconduct.

II. Whether the Court of Appeals erred in determining that petitioners' speech and conduct activities were not protected by the First Amendment's freedom of speech and assembly provisions, and in declining to undertake a full examination of the record on this issue.

III. Whether the Court of Appeals erred by holding, in the alternative, that petitioners' procedural due process claims were extinguished and rendered moot by the District Court's *de novo* proceedings, where the Court's remedial powers are limited to evaluating petitioners' federal First Amendment claims, but a new college disciplinary tribunal would have independent state law power to assess lesser penalties ranging from reprimand to limited suspension, regardless of the outcome of the First Amendment question.

Statement of the Case

Petitioners are former students at Bluefield State College, Bluefield, West Virginia. Until October 16, 1967, they were students in good standing. On that date respondent Hardway, President of Bluefield State College, notified each petitioner by letter of his *ex parte* determination that they should be indefinitely suspended. Hardway sent to

each petitioner the same letter[1] charging participation in a demonstration on October 14, 1967, which had allegedly been disruptive. The demonstration had been staged during a football game on the previous weekend.

The Hardway letter stated that petitioners were "immediately suspended *indefinitely* from [the] College." [Emphasis in letter.] Moreover, it indicated that petitioners would "not be permitted on the grounds or in the buildings" while suspended. The letter also stated that petitioners could appeal the *ex parte* decision "to the College Faculty Committee on Student Affairs. . . ." Further appeal from the Committee lay to the President, Hardway, who had made the initial *ex parte* decision.

Each petitioner formally requested a hearing before the Committee. At that time the Committee consisted of six faculty members, appointed by and removable at the pleasure of President Hardway (Tr. 393).[2]

Six petitioners (Newbold, Malone, Miller, S. Smith, Pilgrim, and A. Saunders) appeared before the Committee with retained counsel to advise them (Tr. 401). They were told that counsel were not permitted to be present.[3] The six then refused to be subjected to the proceedings.

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[1] A copy of the letter is included in the Appendix to this petition, p. 29a. The one petitioner (Allan Tucker) who received a different letter was reinstated by the District Court.

[2] Three members of the Committee testified at the trial. This testimony revealed that there was no fixed procedure (Tr. 488-40; 957-59; 991-92). In fact one member stated that she could not recall ever taking a vote on a student's guilt or innocence (Tr. 1012).

[3] In theory the students were permitted to be represented by a non-legal adviser of their choice, including faculty members (Tr. 957). Two former faculty members testified that as a result of

The other four petitioners appeared without the benefit of counsel. After hearings the Committee recommended conditional reinstatement for two (Tucker and Hill) and continued indefinite suspension for the other two (Barker and A. Smith). President Hardway affirmed the recommendations of the Committee in each instance.[4]

At the proceedings President Hardway, according to his own testimony "in most instances . . . was in the hearing as the accuser" (Tr. 390). A short excerpt from his testimony is instructive on the kind of hearing[5] which petitioners received (Tr. 391-94):

> Q. Well, Doctor Hardway, if I understand your testimony you're telling me that you saw the ten charged parties do what they did? A. Yes, sir.
>
> Q. And that you adjudged them guilty, isn't that right? A. Well, I hadn't told you that.
>
> Q. Well, is that right? A. That's right, yes, sir.
>
> Q. And no matter what kind of hearing they had they still would have been guilty, isn't that correct? (No reply.)

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trying to aid students in disciplinary difficulties they had been declared *persona non grata* by Doctor Hardway and decided to leave the college (testimony of Professor Emma Sue Phelps, Tr. 35-36, 39-64; testimony of Professor Janet Lee Hall, Tr. 143-54).

[4] Minutes from three of the four hearings were not prepared until subpoenaed over two months later for the District Court's proceedings in this case (Tr. 445). Apparently Doctor Hardway affirmed the recommendations with no consideration of what occurred in the hearings other than the conclusions.

[5] Minutes of the Barker hearing, for example, clearly show that no witness appeared against him (Petitioners' Exhibit 14). The Committee asked him for explanations of his alleged behavior. Since "[he] was unable to give any logical reasons for his personal behavior nor to encourage any hope for improved behavior," *id.*, the Committee recommended continued suspension.

Q. Yes or no sir? A. Yes, they were guilty.

• • • • •

Q. Well, could you admit that you might have been wrong about any of these ten? A. I positively know I was not wrong about any of the ten.

• • • • •

Q. Well, sir, if you went into a committee and said, "I positively saw X doing these things, and I heard him say something, and I am positive it was him, I was right there, I saw him," and then the committee comes down to—comes down with a finding that X was not there at all, and he didn't say what you say he said. Wouldn't that be a slap in your face? A. Well, it would be—it would be a disappointment.

Although the Committee's recommendations were not final, and were subject to review by President Hardway, he testified that his "ordinary procedure" (Tr. 386) was to act on the Committee's recommendations the same or following day. He further testified that he did not "ordinarily see the minutes of the committee. They're kept for their own use" (Tr. 390).

According to the testimony of Mr. Randolph White, a member of the Committee, "we try to determine the accuracy of the guilt" (Tr. 441). The evidence thus indicated that both the Committee, and Doctor Hardway (the one-man appellate tribunal), acted on a presumption of guilt which the students had to rebut if they were to be allowed to continue their higher education.

A final observation on Committee procedures which relates to the claim made here that the procedural due

process issues were not mooted by the *de novo* trial, is Doctor Hardway's testimony that "[i]n a hearing there can be many things discovered that would regulate or temper the punishment that was to result" (Tr. 392). Accordingly, the Court of Appeals' finding that petitioners' conduct was not protected by the First Amendment does not end the controversy. A new, and fair, hearing by the Committee could impose a lesser sanction than expulsion.

A full review of the testimony on the demonstration cannot be undertaken in this petition. The principal witness against petitioners was President Hardway. He claimed that the students disrupted the latter part of the football game and obstructed his view. Similarly, he testified that the students endangered him and other spectators. The District Court weighted his testimony heavily even though the demonstration had been staged to protest his policies and practices which the students claimed were racially discriminatory and destructive of First Amendment rights.

Petitioners, however, testified that considerable and successful efforts had always been made to instill concepts of nonviolence in the student group which planned the demonstration (Tr. 220, 539-40). The testimony showed that the students made frequent appeals to the U. S. Constitution and the Bill of Rights as supporting fairer disciplinary hearings and rights of expression for the students. Petitioners' Exhibit 1 is such an appeal, as are petitioners' Exhibits 2 and 22.

Moreover, Floyd Meadows, husband of a Bluefield faculty member, who took many of the photographs (Petitioners' Exhibits 27-30), testified that he observed no vio-

lence and heard no threats during the game (Tr. 1106-1110). Mr. Meadows' photographs of the demonstration directly contradict President Hardway's testimony. The District Court, however, made no reference to the photographic evidence and declined to make further findings of fact after judgment as to the accuracy and relevance of the photographs. See Order entered May 28, 1968.

On April 10, 1968, the District Court entered judgment based on testimony and evidence received at the trial from January 2 to 12, 1968. The Court dismissed the complaint on that date, and further denied, on May 28, 1968, petitioners' motion for a new trial and additional findings of fact.

Thereafter, on August 5, 1968, petitioners filed a motion for temporary injunctive relief and an accelerated appeal before the Court of Appeals for the Fourth Circuit. On August 12, 1968, Chief Judge Haynsworth advised petitioners that the appeal would be granted. That court heard the appeal on August 26, 1968, a Monday, and rendered its per curiam decision the following Tuesday, September 3, 1968.

The Court of Appeals gave no indication that it had exercised its prerogative of undertaking a full review of the record, but apparently applied a "clearly erroneous" standard in finding the judgment below "supported by the record," 399 F. 2d at 638, Appendix 2a. The Court ruled that "the administrative appeals which the college afforded the students satisfied the requirements of due process of law." *Id.* Further, the Court held that "[t]he proceedings in the district court render moot the students' contention that they were denied due process at the college level." *Id.*

When and How the Federal Questions Were Raised and Decided Below

The sole issues involved in this litigation have been questions of federal law. At the trial in the District Court petitioners claimed they had been suspended indefinitely from Bluefield State College prior to a hearing adequate to meet the basic requirements of federal due process. Petitioners further claimed that their speech and conduct were protected by the First Amendment and could not therefore form the basis of disciplinary proceedings.

The District Court ruled against petitioners on both aspects of the case.

Petitioners processed an accelerated appeal to the Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed, per curiam, ruling that the lower court's opinion was supported by the record and applicable law. The per curiam disposition further ruled that petitioners had in effect waived their procedural due process rights by undertaking a trial on the merits of the First Amendment claim. The *de novo* proceedings in the District Court were thus found, in the alternative, to render the procedural due process issues moot, and to foreclosure further college hearings.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided important questions of constitutional law which have not been but should be resolved by this Court. The Court of Appeals' determination on the scope of procedural due process rights for students in college disci-

plinary proceedings seems in conflict with applicable rulings from this Court, and the Fifth and Second Circuits. Moreover, the Court of Appeals' ruling on the scope of review of a First Amendment claim appears to be in direct conflict with applicable decisions of this Court.

Introduction

The importance of the issues in this case far transcends its particular facts and the interests of the individual litigants. Affected are the interests of nearly four million college students and over eight hundred public institutions of higher education.[6] The fairness of disciplinary proceedings in these institutions, particularly where First Amendment rights are at stake, has a direct bearing on the quality of education offered and the degree to which enlightened academic freedom can flourish.

In other settings this Court has recognized the importance of the fundamental right to pursue educational opportunity:

> Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954).

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[6] In 1966 eight hundred and twenty-one public institutions of higher education enrolled approximately 3,624,000 students. U. S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1968,* Tables 145 & 146, at 105 (89th ed. 1968).

However, outside of the equal protection context, this Court has not heard a controversy between a college student and his institution since 1934 in *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 (upholding compulsory ROTC).[7] Consequently, the lower federal and state courts are left without guidelines at a time when litigation between students and institutions of higher education has reached unprecedented volume.[8]

The issues presented in this case are live and appropriate for present consideration by this Court. Not only is the

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[7] Denials of certiorari include, e.g., *Mustell* v. *Rose*, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 89 S. Ct. 297 (1968); *Madera* v. *Board of Education*, 267 F. Supp. 356 (S. D. N. Y.), *rev'd*, 386 F. 2d 778 (2d Cir. 1967), *cert. denied*, 390 U. S. 1028 (1968); *Dixon* v. *Alabama Board of Education*, 186 F. Supp. 945 (M. D. Ala. 1960), *rev'd*, 294 F. 2d 150 (5th Cir.), *cert. denied*, 368 U. S. 930 (1961); *Steier* v. *New York State Educ. Commn'r*, 271 F. 2d 13 (2d Cir. 1959), *cert. denied*, 361 U. S. 966 (1960).

[8] In addition to the decisions cited above, one can include, from the last two years alone, the following examples of completed or pending cases between students and institutions. E.g., *Wright* v. *Texas Southern University*, 392 F. 2d 728 (5th Cir. 1968); *Wasson* v. *Trowbridge*, 382 F. 2d 807 (2d Cir. 1967); *Troy State University* v. *Dickey*, No. 25507 (5th Cir. 1968), *vacating as moot* 273 F. Supp. 613 (M. R. Ala. 1967); *Esteban (II)* v. *Central Missouri State College*, 290 F. Supp. 622 (W. D. Mo. 1968) (appeal pending); *Esteban I*, 277 F. Supp. 649 (W. D. Mo. 1967); *Jones* v. *Board of Education*, 279 F. Supp. 190 (M. D. Tenn. 1968) (appeal pending); *Greene* v. *Howard University*, 271 F. Supp. 609 (D. D. C.), *injunction pending appeal granted*, No. 21267 (D. C. Cir. Sept. 8, 1967); *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S. D. N. Y. 1968); *Snyder* v. *Board of Trustees*, 286 F. Supp. 927 (N. D. Ill. 1968); *Moore* v. *Troy State University*, 284 F. Supp. 725 (M. D. Ala. 1968); *Zanders* v. *Board of Education*, 281 F. Supp. 747 (W. D. La. 1968); *Buttny* v. *Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Dickson* v. *Sitterson*, 280 F. Supp. 484 (M. D. N. C. 1968); *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (D. S. C. 1967). Without exception each of the above cases raised either an issue of procedural due process or First Amendment rights.

amount of litigation significant and increasing, but a considerable quantity of mature legal commentary is available as background.[9] Similarly, professional educational associations have recently promulgated a body of customary standards which bear directly on the kinds of questions raised in this case.[10] At a recent symposium on the legal aspects of student-institutional relationships the Dean of New York University School of Law paraphrased a classic colloquy between the Lord Chief Justice of Ireland and a barrister. He wrote:[11]

> In the hills and vales of New York from which I come we now speak of little else than matters of student discipline and student conduct, and the institutional relationship among students, faculty, and administration.

The discussion, moreover, is neither idle nor trivial. What was said by this Court in the context of juvenile detention proceedings bears repeating here:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and prescriptions of remedy. Due process of law is the primary

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[9] The symposium length publications alone include, *e.g.*, *Legal Aspects of Student-Institutional Relationships*, 45 DENVER L. J. 497-678 (1968); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1128-59 (1968); *Symposium—Student Rights and Campus Rules*, 54 CALIF. L. REV. 1 (1966).

[10] *Joint Statement on Rights and Freedoms of Students*, 54 A. A. U. P. BULL. 258 (1968) (approved by AAUP, USNSA, AAC, and AAHE).

[11] McKay, *The Student as Private Citizen*, 45 DENVER L. J. 558 (1968).

> and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. *In re Gault*, 387 U. S. 1, 19-20 (1967).

A study of disciplinary procedures conducted in 1963 revealed the following "departures from what is ordinarily provided even for petty criminal offenders:" [12]

> [Of seventy-two state universities responding to a mail questionnaire] * * *
>
> 3. Sixteen percent do not even provide for a hearing in cases where the student takes exception to the charge of misconduct or to the penalty proposed;
>
> 4. Forty-seven percent allow students or administrators who appear as witnesses or who bring the charge, to sit on the hearing board if they are otherwise a member;
>
> 5. Thirty percent do not allow the student charged to be accompanied by an adviser of his choice during the hearing; * * *

A study of the American student's freedom of expression revealed similarly deplorable states of affairs. The latter researchers reported: [13]

> [A]t [large] public universities attempts to establish student freedom have not yet been consummated. Stu-

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[12] Van Alstyne, *Procedural Due Process and State University Students*, 10 U. C. L. A. Rev. 368, 369 (1963).

[13] E. G. Williamson & J. L. Cowan, The American Student's Freedom of Expression 155-56 (1966).

> dents and administrators are not generally in agreement about the actual limits of freedom as it is practiced now and, furthermore, no unusually large number of administrators show enthusiasm for the principle of academic freedom for students.
>
> • • • • •
>
> Evidently, student academic freedom is neither practiced nor advocated to an unusual extent in the smaller public universities . . . .

In sum, the importance to students and society that expulsions not be arbitrary, the lack of directly controlling precedent from this Court, the volume of litigation in the lower federal courts, the widespread public interest in student legal rights, and the evidence that large numbers of students are unjustifiably denied procedural due process and First Amendment rights, all combine to urge that the writ issue in this case.

I.

Respondents deprived petitioners of liberty without due process of law by indefinitely expelling them from a public institution of higher learning prior to a hearing and refusing to readmit them after offering hearings in which petitioners would have been prejudiced by absence of the procedural safeguards essential to a fair administrative adjudication.

The question of a student's right to a fair hearing before he is suspended or expelled is important from three perspectives. First, the student's interest in pursuing higher education is of considerable magnitude. Second, the Fourth Circuit's holding on this point appears in direct conflict with a decision from the Fifth Circuit. Third, the interest of the State in not holding a hearing prior to expulsion is neither overriding nor compelling, but is little more than a matter of administrative convenience.

A student's interest in remaining at a public institution is valuable to himself and society in numerous ways. His education will better enable him to play a significant role in the on-going progress of society. Higher education is much more than a key to economic well-being; it has been recognized since the time of Jefferson to be the most significant factor in the quest for enlightened democracy. Similarly, the penalty of expulsion can be irrevocable and devastating.[14] In the instant litigation one student almost

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[14] Professor Seavey observed in 1957 that "the harm to the student may be far greater than that resulting from the prison sentence given to a professional criminal. A student thus dismissed from a medical school not only is defamed without the opportunity to demonstrate his innocence but is probably barred from becoming a physician. A law-school student dismissed for cheating will not

immediately lost federal educational benefits. Others found themselves in jeopardy of unjustifiably losing selective service deferments. And, as the Fifth Circuit stated in *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150, 157 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961),

> [it] is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which plaintiffs were in good standing is an interest of extremely great value.

In this case it is undisputed that petitioners were indefinitely suspended prior to a hearing and thereby forced to assume the burden of seeking reinstatement. "Defendants admit that plaintiffs were suspended without hearing . . . ." *Defendant's Answer,* p. 9. Both the District Court and the Court of Appeals approved this procedure as consistent with due process, apparently because of later opportunities for a hearing.

Yet this holding is in direct conflict with that of *Dixon* and of lower court cases which follow *Dixon.* In that case Circuit Judge Rives, joined by Judge Wisdom specifically held that "due process requires notice and some opportunity for hearing *before* students at a tax supported college are expelled for misconduct." [Emphasis added] 294 F. 2d at 151. Other federal courts have followed *Dixon* in this respect. See, e.g., *Moore* v. *Troy State University,*

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be admitted to practice even if he is able to complete his legal education." Seavey, *Dismissal of Students: "Due Process",* 70 HARV. L. REV. 1406, 1407 (1957).

284 F. Supp. 725, 727 (M. D. Ala. 1968); *Esteban (I)* v. *Central Missouri State College,* 277 F. Supp. 649, 651 (W. D. Mo. 1967) ("plaintiffs as students at a state college are entitled to procedural due process before they can be suspended from college"); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613, 615 (M. D. Ala. 1967) ("due process requires notice and some opportunity for a hearing before suspension or expulsion").

The view that college security and administrative convenience should permit summary, and possibly arbitrary, expulsion has been uniformly rejected not only by the courts above but also by the large number of professional educational organizations which prepared and endorsed the *Joint Statement on Rights and Freedoms of Students,* 54 A. A. U. P. BULL. 258, 261 (1968). In any event, expulsion prior to hearing is seldom necessary to protect public order. The college may impose less severe, temporary restrictions on the students' activity until hearings are complete.

Not only does the decision below conflict with *Dixon,* but it is at odds with decisions of this Court in administrative procedure. Expulsion from college is the "academic death penalty". In many ways it is equivalent to quasi-criminal penalties such as disbarment, termination of public employment, deportation, and even juvenile detention proceedings. In each of these areas this Court has insisted upon adherence to the fundamental standards of procedural due process.

For example, only last term, this Court, in an opinion by Mr. Justice Douglas, recognized that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer," *In re Ruffalo,* 390 U. S. 544,

550 (1968), and required that specific notice of charges be given because "[t]hese are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U. S. 1." *Id.* at 551. See also *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 103-05 (1963) (applicant to bar cannot be excluded with no hearing and no opportunity to confront or cross-examine witnesses against him). Expulsion from college may be even more serious than disbarment or refusal to license in its impact on the individual's future professional opportunities.

Similarly, where public employment was at issue, as in *Greene* v. *McElroy,* 360 U. S. 474 (1959) (government contractor), "[t]his Court has been zealous to protect [the rights of procedural due process] from erosion. It has spoken out not only in criminal cases • • • but also in all types of cases where administrative and regulatory actions were under scrutiny. • • • " [Citations omitted.] 360 U. S. at 497. See also *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956). Absence of a college education, of course, almost wholly precludes many kinds of public employment. Moreover, here there are no considerations of national security such as were present in *Greene.*

Additionally, in another administrative area where legislative power is virtually plenary and national security important, that of deportation, this Court has insisted upon fair hearings *prior* to expulsion from the shores of this country. In language particularly appropriate to the instant setting, this Court has held that a resident alien cannot be deported without a fair hearing even though the deportation order was based on confidential matter the disclosure of which would allegedly not be in the public interest. The Court in *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 597 (1953), stated:

> Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing . . . .

See also *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, 267-68 (1954); *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950).

Again, in the administrative area of mail fraud orders, this Court, in an unanimous decision rendered by Mr. Justice Black, overturned an order for the procedural due process defect of undue restriction on the right to cross-examine. *Reilly* v. *Pinkus,* 338 U. S. 269, 275 (1949). The injury inflicted upon petitioners in the instant case is at least, if not much more, serious than that in *Pinkus.*

Finally, because of the severe penalties involved in this case, analogies on procedural fairness can be taken from the sphere of juvenile detention, if not criminal procedure. Petitioners contend that "the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college." *Dixon, supra,* 294 F. 2d at 159. As Mr. Justice Fortas stated in *In re Gault,* 387 U. S. 1, 27-28 (1967):

> [It] would be extraordinary if our Constitution did not require that procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.

Cf. *Kent* v. *United States,* 383 U. S. 541 (1966); *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963). ("From the very beginning, our state and national constitutions and laws

have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals . . . .")

For the reasons stated above the procedural due process questions in this case are important and far-reaching. A conflict is apparent between the decision below and that of *Dixon* in the Fifth Circuit. Moreover, decisions of this Court in several administrative areas, involving both constitutional and statutory interpretation, indicate in principle that the Court of Appeals has applied an incorrect standard.

A. Right to Fair and Impartial Hearings in Which Members of the Tribunals Had No Prior Official Involvement in the Controversy and Did Not Actively Participate as Witnesses Against the Students Charged With Misconduct.

A student's right not to be expelled by an inherently biased set of procedures has been variously treated by the Fourth, Second, and Fifth Circuit Courts of Appeal. In the instant litigation the principal witness against petitioners was the college president, Doctor Hardway. He testified that "they [the ten students charged with misconduct] were guilty. . . . I positively know I was not wrong about any of the ten" (Tr. 391-92). It was Doctor Hardway who issued the *ex parte* indefinite suspensions, who appeared as the chief witness against the students at the disciplinary hearings, and to whom an appeal lay from the recommendations of the disciplinary committee. He was the tribunal of first instance, the prosecutor, the state's chief witness, and the appellate tribunal.

As noted previously a study of disciplinary procedures in state universities showed that "[f]orty-seven per cent

allow students or administrators who appear as witnesses or who bring the charge, to sit on the hearing board . . . ." Van Alstyne, *Procedural Due Process and State University Students,* 10 U. C. L. A. L. REV. 368, 369 (1963). The problem is thus widespread. Yet the Court of Appeals concluded that "the administrative appeals [from *ex parte* suspension] which the college afforded the students satisfied the requirements of due process of law." *Barker* v. *Hardway,* 399 F. 2d 638 (4th Cir. 1968); Appendix p. 2a.

Although the Court of Appeals cited no authority for its per curiam disposition, a recent Second Circuit decision is directly to the contrary, *Wasson* v. *Trowbridge,* 382 F. 2d 807, 813 (2d Cir. 1967). In *Wasson,* Judge Moore, joined by Judges Friendly and Anderson ruled:

> It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain.

Accordingly, the Second Circuit remanded the case for a hearing on Wasson's allegations that members of the United States Merchant Marine Academy tribunal which disciplined him "had participated in the investigation against him." *Id.* The prior official involvement of Doctor Hardway in this case is far more serious; yet the District Court and Fourth Circuit gave almost no consideration to this procedural due process question.

A similar question was considered by the Fifth Circuit in *Wright* v. *Texas Southern University,* 392 F. 2d 728 (5th Cir. 1968), *aff'g* 277 F. Supp. 110 (S. D. Tex. 1967), and is also presently before the Sixth Circuit in an appeal argued on December 13, 1968. *Jones* v. *Board of Education,*

279 F. Supp. 190 (M. D. Tenn. 1968), *appeal pending* No. 18,482 (6th Cir.).

The District Court in *Wright* observed that

> [a]pplication of the notice-and-hearing requirement to colleges and universities presents somewhat of a theoretical dilemma when the University official in charge of student discipline is a witness to the student's misconduct. It is my opinion, however, that the University official is not disqualified from making the determination of what disciplinary action is to be taken, if any. 277 F. Supp. at 112 n. 1.

In affirming *Wright* the Fifth Circuit relied on the official's personal observations as well as the fact that the students could not be found after diligent efforts by the college officials who were attempting to notify them of the charges of misconduct. *Wright,* then, appears to disagree in principle with *Wasson.*

Jones, in the District Court, presents a more direct clash with *Wasson.* There the Court ruled that "the fact that two members of the [disciplinary committee] testified against the plaintiffs is [not] sufficient in itself to constitute a denial of fundamental fairness." 279 F. Supp. at 200. The Court required the plaintiffs to prove that the witness-judges were biased, a burden of considerable magnitude, which would require the students to elicit statements of bias in most cases from the mouths of the tribunal members.

A decision by this Court would resolve this difficult, important, and recurring question, and there have been numerous indications by this Court of serious concern over

the injustice inherent in impartial tribunals which pass on questions of importance to the lives, fortunes, and liberties of citizens.

A relevant observation was recently made by Mr. Justice Marshall in his appendix to the Court's opinion in *Pickering* v. *Board of Education,* 391 U. S. 563 (1968), decided last term. For the first time, in this Court, Pickering challenged his dismissal from a teaching position on the separate and independent due process ground that the procedure followed "deprived him of due process in that he was not afforded an impartial tribunal." 391 U. S. at 579 n. 2. While this Court declined to review that particular issue since it had not been raised before, a special observation was made that "we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning *vis-à-vis* [Pickering]. Compare Tumey v. Ohio, 273 U. S. 510 (1927); In re Murchison, 349 U. S. 133 (1955)." *Id.* Petitioners in the instant litigation raised the procedural due process questions at the outset. The issue here concerns the same kind of tribunal of educators.

Further indications of the importance this Court has attached to impartial administrative hearings can be found in its construction this term of the United States Arbitration Act in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 37 U. S. L. W. 4037, 4038 (Nov. 18, 1968). ("[We] should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts . . . .") A comparable posture was taken in the early holding that the Administrative Procedure Act, and its provisions for separation of prosecutorial and ad-

judicative functions, applied to deportation hearings. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 50 (1950). ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.")

Moreover, expulsion from college approaches the seriousness of a quasi-criminal penalty. There is ample authority in this area that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 14. . . . " *In re Murchison,* 349 U. S. 133, 136 (1955). See also *Parker* v. *Gladden,* 385 U. S. 363, 365 (1966) (per curiam) (right to impartial jury requires reversal where bailiff indicated to jurors that he considered defendant guilty).

A final way in which the Court of Appeals' decision in this case seriously departs from others in a way justifying review by this Court can be seen from a review of analogous decisions from other Courts of Appeal on the type of question presented here. The Sixth and Fifth Circuits, and the District of Columbia Circuit have held the Federal Trade Commission to strict standards of impartiality. See *American Cyanamid Co.* v. *FTC,* 363 F. 2d 757 (6th Cir. 1966); *Pillsbury Co.* v. *FTC,* 354 F. 2d 952 (5th Cir. 1966); *Texaco, Inc.* v. *FTC,* 336 F. 2d 754 (D. C. Cir. 1964), *vacated and remanded on other grounds,* 381 U. S. 739 (1965) (per curiam). Other Court of Appeals' decisions have similarly required scrupulous impartiality from the Securities and Exchange Commission, the Civil Aeronautics Board, and the National Labor Relations Board. See, e.g., *Amos Treat & Co.* v. *SEC,* 306 F. 2d 260 (D. C. Cir. 1962); *Trans World Airlines* v. *CAB,* 254 F. 2d 90 (D. C. Cir.

1958); *Berkshire Employees Ass'n* v. *NLRB*, 121 F. 2d 235 (3d Cir. 1941).

Yet, in this case, where the First Amendment rights of students appearing before a tribunal of faculty members to seek reinstatement are at stake, the Fourth Circuit summarily rejected their procedural due process claim.

In addition to the above, the *Joint Statement on Rights and Freedoms of Students*, 54 A. A. U. P. BULL. 258, 261 (1968), takes the unequivocal position that "[no] member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding."

In sum, the Court of Appeals' decision conflicts with an applicable ruling from the Second Circuit, is contrary to the principle of decisions from this Court, and flies in the face of administrative law decisions on analogous questions.

B. Right to Be Accompanied, Advised and Represented by Retained Counsel.

A further important and recurring question presented by this petition is whether the students could claim a right to be accompanied by retained legal counsel when appearing before the faculty disciplinary committee to seek reinstatement from their *ex parte* expulsions. The Court of Appeals' decision on this point conflicts with two decisions it did not consider—one from the Western District of Missouri, a second from the New York State Supreme Court. *Esteban (I)* v. *Central Missouri State College*, 277 F. Supp. 649, 651 (W. D. Mo. 1967); *Goldwyn* v. *Allen*, 54 Misc. 2d 94, 281 N. Y. S. 2d 899 (Sup. Ct. Queens Cty. 1967). Moreover, the decision below is wholly out of line with the

principle of decisions by this Court, common practice, the recommendations of professional organizations, and the considered analysis of the overwhelming majority of commentators.

The right to be accompanied by counsel at the adjudicative stage of an expulsion proceeding before a faculty committee is crucial to a student. While "[a] college . . . might feel that use of counsel is too burdensome in routine disciplinary proceedings [,] [t]he short answer to the school's claim is that what seems to the administrator a minor problem may be to the student the disaster of his life." *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1141 (1968). Here, as in juvenile offender proceedings, the student "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." Mr. Justice Fortas in *In re Gault,* 387 U. S. 1, 36 (1967). Guidance of counsel is particularly crucial in this case, not only because the "academic death penalty" had already been imposed before hearing, but because the law in this area is far from settled and clear. The college is backed by the full power of the state, and may draw upon advice from the state attorney general or its corporate counsel. The student needs similar guidance.

Apparently the District Court based its conclusion on this issue upon its assumption that the hearing was advisory, recommendatory, and investigatory. This is both erroneous and not ultimately relevant. The college President, Mr. Hardway, issued the expulsion orders *ex parte.* There was neither hearing nor representation by counsel. Moreover, Hardway reviewed the disciplinary committee's

findings on the same or next day, as he testified (Tr. 386). There was no hearing on this *pro forma* review. This is not a case of a broad rule-making or investigatory hearing. The students were presumed guilty, had already been expelled, and were urging the committee to recommend reinstatement. Here, as in *Goldwyn, supra,* "punitive sanctions had already been imposed and the apparent, if not the obvious purpose of the conference was to determine whether the facts justified the action already taken." 54 Misc. 2d at 97, 281 N. Y. S. 2d at 904.

In any event, if the disciplinary hearing is viewed as purely investigatory, then the students never had a hearing with counsel before expulsion was final.

Lower court decisions supporting the right to bring counsel to expulsion hearings were ignored by the District Court and Court of Appeals. These include *Esteban (I)* v. *Central Missouri State College,* 277 F. Supp. 649, 651 (W. D. Mo. 1967) ("plaintiffs shall be permitted to have counsel present with them at the hearing to advise them . . ."); *Goldwyn, supra.* To the contrary, in dictum, is *Due* v. *Florida A. & M. University,* 233 F. Supp. 396, 403 (N. D. Fla. 1963). Cf. *Madera* v. *Board of Education,* 386 F. 2d 778 (2d Cir. 1967), *cert. denied,* 390 U. S. 1028 (1968) (right to counsel not applicable at high school guidance conference where expulsion not at issue); *Cosme* v. *Board of Education,* 50 Misc. 2d 344, 270 N. Y. S. 2d 231 (Sup. Ct. N. Y. Cty. 1966), *aff'd mem.,* 27 App. Div. 2d 905, 281 N. Y. S. 2d 970 (1st Dep't 1967).

In addition, the Court of Appeals' decision conflicts in principle with decisions of this Court. *In re Groban,* 352 U. S. 330 (1957) (5-4), took the stance that counsel must be allowed to attend "an administrative proceeding that

would . . . adjudicate . . . responsibilities . . . ." 352 U. S. at 332. A majority, however, found the particular hearing (an investigation by a fire marshall) to be "a proceeding solely to elicit facts . . ." 352 U. S. at 332. A dissenting opinion by Mr. Justice Black, joined by Justices Douglas, Brennan, and the Chief Justice, pointed out that

> this Court has never held and I would never agree that an administrative agency conducting an investigation could validly compel a witness to appear before it and testify in secret without the assistance of his counsel. 352 U. S. at 348.

Regardless of how one views this case, petitioners never had an administrative hearing, before the committee or President Hardway, in which they could be accompanied by counsel. See also *In re Oliver,* 333 U. S. 257, 273 and n. 31 (1948); *Kent* v. *United States,* 383 U. S. 541 (1966); *Mempa* v. *Rhay,* 389 U. S. 128, 135 (1967); *Powell* v. *Alabama,* 287 U. S. 45, 68-69 (1932); *Goslin* v. *Thomas,* 400 F. 2d 594 (5th Cir. 1968); *Shioutakon* v. *District of Columbia,* 236 F. 2d 666, 669 n. 18 (D. C. Cir. 1956).

Further, in the closely analogous area of deportation proceedings, the Ninth Circuit recognized that "[an] alien . . . must be afforded due process of law, including . . . the right to examine witnesses . . . and to be represented by counsel . . . ." *Hyun* v. *Landon,* 219 F. 2d 404, 406 (9th Cir. 1955) (dictum), *aff'd mem. by an equally divided court,* 350 U. S. 990 (1956). That case involved serious questions of national security and administrative efficiency which by no stretch of the imagination are present here.

Finally, it should be pointed out that the vast majority of colleges have not chosen to exclude counsel from dis-

ciplinary hearings, at least before the Fourth Circuit issued a *carte blanche* in this litigation. A survey previously cited found that only "[t]hirty per cent do not allow the student charged to be accompanied by an adviser of his choice during the hearing . . . ." Van Alstyne, *Procedural Due Process and State University Students,* 10 U. C. L. A. L. REV. 368, 369 (1963). Similarly, the *Joint Statement on Rights and Freedoms of Students,* 54 A. A. U. P. BULL. 258, 261 (1968), recommends that "[t]he student . . . should have the right to be assisted in his defense by an adviser of his choice." And, considered legal commentary takes the same position. *See, e.g.,* Van Alstyne, *The Student as University Resident,* 45 DENVER L. J. 582, 593 (1968); Heyman, *Some Thoughts on University Disciplinary Proceedings,* 54 CALIF. L. REV. 73, 79 (1966); Johnson, *The Constitutional Rights of College Students,* 42 TEXAS L. REV. 344, 352 (1964). ("[It] is extremely doubtful that the university could constitutionally deny the student the right to be represented by outside counsel.")

C. Right to Confront and Cross-examine the Witnesses Against Them.

At two stages petitioners were denied an opportunity to confront and cross-examine witnesses against them. The *ex parte* expulsion foreclosed this right. Similarly, the right was meaningless in the appeal from the disciplinary committee to President Hardway because Hardway was both the appellate tribunal and the chief witness against the students.

This Court has "emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his

livelihood. See Greene v. McElroy, 360 U. S. 474 . . . ." *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 103 (1963). Both *Willner* and *Greene* were administrative cases.

Similarly, in *In re Murchison,* 349 U. S. 133, 138-39 (1955), this Court pointed out that adequate confrontation and cross-examination were impossible where the tribunal itself was the principal prosecution witness:

> If the charge should be heard before that judge, the result would either be that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting the testimony upon which he must finally pass . . . . The right . . . to examine and cross-examine witnesses is too essential . . . to have that right jeopardized in such way.

Although a fair hearing is virtually impossible without these rights, the Court of Appeals found no denial of due process. This result is in apparent conflict not only with *Willner, Greene,* and *Murchison,* but also *Esteban (I)* v. *Central Missouri State College,* 277 F. Supp. 649, 651-52 (W. D. Mo. 1967). But see *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150, 159 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961); *State ex rel. Sherman* v. *Hyman,* 180 Tenn. 99, 110, 171 S. W. 2d 822, 826 (1942), *cert. denied,* 319 U. S. 748 (1943).

D. Right to Be Presumed Innocent of Alleged Misconduct.

The testimony of President Hardway set out on page 5 of this petition shows that both he and the disci-

plinary committee presumed that the students were guilty of misconduct justifying indefinite expulsion (Tr. 391-94, 441). Implicit in the concept of a fair and impartial hearing is the principle that adjudications not be based on a presumption of guilt. This is due process in its most elementary sense and requires no citation of authority to illustrate the clash with decisions of this Court.

II.

The Court of Appeals erred in determining that petitioners' speech and conduct activities were unprotected by the First Amendment's freedom of speech and assembly provisions, and in declining to undertake a full examination of the record on this issue.

In three respects the Court of Appeals erred in its treatment of the important First Amendment questions raised in this case. First, contrary to the explicit requirements of this Court's decisions, there was no independent examination of the entire record. Second, the appeals court permitted expulsion in a setting where the relationship between the educational purposes of the college and the speech and conduct censured was at best tenuous. Third, the lower court erroneously concluded that petitioners' activities exceeded the range protected by the First Amendment.

A. Scope of Review.

On August 26, 1968, the Court of Appeals heard accelerated argument. That Court, working from only one copy of the nearly 1200 page transcript, rendered its per curiam disposition on September 3, 1968. It is apparent that the

"clearly erroneous" standard of review was applied in finding the judgment below "supported by the record" rather than correct or incorrect based on an entire examination of the record. 399 F. 2d 638; Appendix 2a.

This Court has repeatedly held "that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. E.g., * * * New York Times Co. v. Sullivan, 376 U. S. 254, 285 (1964)." *Pickering* v. *Board of Education,* 391 U. S. 563, 578 n. 2 (1968). See also *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961), where the Fifth Circuit fully examined the record and overturned student expulsions on procedural due process grounds.

The decision below therefore conflicts both with *Pickering* and *Dixon* on the important question of scope of review.

B. Relationship Between Expression and Conduct by Petitioners and the Legitimate Educational Functions of the College.

A second important aspect of petitioners' First Amendment claim concerns the extent to which a college can punish students for expression and conduct away from the institution in a social setting wholly unrelated to the educational functions of the institution. A demonstration at a football game is scarcely different from one at a public event in a nearby city. At some point an institution's control over its students must end, and legitimate government interests must be left to penal authorities. For example, it might be doubted whether the college could have revoked

the diplomas of alumni who participated in the demonstration or whether it could refuse admission to a graduate school physics department for undergraduates who participated in such a demonstration within the past five years.

Because of the *in terrorem* impact of geographically unlimited school rules on politically active students this question is sufficiently important to merit consideration by this Court. Apart from *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943), and *Tinker* v. *Des Moines Independent Community School District,* cert. granted, 390 U. S. 942 (1968) (pending), which were high school cases, there is no guidance available on these points in decisions from this Court.

Decisions in the Fifth Circuit, however, have sought to clarify the relationship between a school's disciplinary power and the exercise of First Amendment freedoms by students, and have done so in a way which sharply conflicts with the principles that guided the Court of Appeals below.

Burnside v. *Byars,* 363 F. 2d 744 (5th Cir. 1966), for example, would permit "reasonable" rules and regulations pertaining to student expression in and around the school, but only if the rules were "materially and substantially" related to "the requirements of appropriate discipline in the operation of the school." 363 F. 2d at 748-49. Such a standard is at odds with a posture that allows school rules to reach a student wherever he may be.

C. Petitioners' Speech and Conduct Were Protected by the First Amendment's Freedom of Speech and Assembly Provisions.

For the limited purposes of this petition there are four observations which indicate strongly that a full review of

the record will vindicate petitioners First Amendment claims on the merits.

Even assuming that petitioners' demonstration at a distant social function has relevance to the educational aims of the college, respondents could only justify expulsion if each petitioner could be shown individually, by a preponderance of the evidence, to have exceeded the bounds of the First Amendment.

First, the petitioners themselves testified that their student rights committee had always stressed nonviolence, and that the demonstration fell far short of being directly threatening to the physical safety of anyone (Tr. 220, 226, 539-40; Petitioners' Exhibits 1, 2, and 22).

Second, although from twenty-five to thirty local policemen followed the demonstration closely (Tr. 223), there were no arrests, and no civil charges were ever brought against the students.

Third, the photographic evidence taken of the demonstration (Petitioners' Exhibits 27-30) refutes any contention that violence occurred or was imminent. Testimony by Floyd Meadows, husband of a faculty member at the institution, similarly contradicts that of respondent's witnesses, and Meadows was the photographer (Tr. 1106-1110).

Fourth, testimony of other witnesses than Doctor Hardway fails to substantiate his charges and identification of petitioners. Two police officers, moreover, testified that two students were trying to keep the demonstration peaceful (Tr. 679, 730).

III.

The Court of Appeals erred by holding, in the alternative, that petitioners' procedural due process claims were extinguished and rendered moot by the District Court's *de novo* proceedings, where the Court's remedial powers are limited to evaluating petitioners' federal First Amendment claims, but a new college disciplinary tribunal would have independent state law power to assess lesser penalties ranging from reprimand to limited suspension, regardless of the outcome of the First Amendment question.

The Court of Appeals' holding that petitioners waived the right to a fair hearing before the disciplinary committee by contesting their expulsions on First Amendment grounds is a striking innovation which conflicts with an applicable decision from the Fifth Circuit, and is contrary to the principle of decisions by this Court.

As a practical matter the decision below would either postpone for years the vindication of a student's First Amendment rights, or postpone forever challenges above the District Court level to college disciplinary procedures.

Dixon v. *Alabama State Board of Education,* 294 F. 2d 150 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961), involved the same kind of situation. Alabama State College expelled, without hearing, a group of students who participated in demonstrations against one or more of the State's racially discriminatory practices. The District Court held a full trial and ruled that the students' conduct was not protected by the Constitution, and that, in any event, they had no right to a hearing before expulsion where the con-

duct was in violation of college rules. 186 F. Supp. 945 (M. D. Ala. 1960). The Fifth Circuit reversed, ruled that notice and hearing were required prior to disciplinary action, and returned the case to the college authorities. The court did not consider it appropriate to pass on the merits of any disciplinary action until it had been taken by a properly constituted college tribunal. The Court below undertook precisely such an examination, and did not consider the possibility that a fairly constituted disciplinary committee might conclude that a lesser punishment was desirable. In this way the Court of Appeals usurped the discretionary state law function of the college disciplinary tribunal. The incorrectness of this procedure was suggested by an earlier commentary on this kind of question:

> [A procedural defect can be cured by a review on the merits] only where the question is one of interpretation of statutory or constitutional rules. Where the claim involves an appeal to the discretion of the administrator, disposition by the court is not satisfactory. *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1143 (1968).

At the trial of this case Doctor Hardway himself gave testimony to substantiate the possibility of mitigated punishment before the committee. "In a hearing there can be many things discovered that would regulate or temper the punishment that was to result" (Tr. 392).

Further support in principle can be found in decisions of this Court. *Kwong Hai Chew* v. *Colding,* 344 U. S. 590 (1953), for example, was a deportation case which held that a resident alien could not be expelled from the country

without a fair hearing, even though the deportation order was based on confidential matter the disclosure of which would not be in the public interest. Similarly, *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954), ruled that an alien could not be expelled without a fair hearing even though he admitted being in the country illegally. Both decisions recognized that the hearing board was required to exercise its discretion fairly, although the conclusion might be foreordained.

In two ways the instant case is even stronger. First, it involves no considerations of national security as are present in immigration matters. Second, petitioners, and those who follow them, are now required to waive their First Amendment rights or postpone their assertions in order to contest the procedures by which they were expelled. This Court has spoken out on numerous occasions against statutes and rules which diluted or extinguished constitutional claims. Most recently, in *United States* v. *Jackson,* 390 U. S. 570, 582 (1968), Mr. Justice Stewart, writing for the Court, stated that

> [w]hatever may be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . Shelton v. Tucker, 364 U. S. 479, 488-489. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

In the instant case there is no need for a Court of Appeals to refuse to review the procedural due process claims of petitioners. If mootness means the absence of a controversy it has no application here. At a fair hearing, before

a properly convened disciplinary committee, the issue would be whether sound discretion justified a penalty less than indefinite expulsion. The Court of Appeals has deprived petitioners of the opportunity to present that issue.

CONCLUSION

For the reasons outlined above the writ of certiorari should be granted.

Respectfully submitted,

ROY LUCAS
20 East Ninth Street
New York, N. Y. 10003

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

HERBERT H. HENDERSON
317 Ninth Street
Huntington, West Virginia 25701

Attorneys for Petitioners

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N. Y. 10003

LEWIS M. STEEL
55 Central Park West
New York, N. Y. 10023
Of Counsel

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 12,660

ALLEN F. BARBER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARSTEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALAN SCOTT TUCKER, Individually and in Behalf of All Those Similarly Situated,

Appellants

versus

APPENDIX

WENDELL G. HARDWAY, President of Bluefield State College; J. J. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and WEST VIRGINIA STATE BOARD OF EDUCATION, a Public Body Corporate,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD.
SIDNEY L. CHRISTIE, *District Judge.*

(Argued August 26, 1968. Decided September 3, 1968.)

Before:

HAYNSWORTH, *Chief Judge*, and
WINTER and BUTZNER, *Circuit Judges.*

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Roy Lucas
20 East Ninth Street
New York, N. Y. 10003

Melvin L. Wulf
156 Fifth Avenue
New York, N. Y. 10010

Herbert H. Henderson
317 Ninth Street
Huntington, West Virginia 25701

Attorneys for Petitioners

Norman Dorsen
School of Law
New York University
Washington Square
New York, N. Y. 10003

Lewis M. Steel
55 Central Park West
New York, N. Y. 10023
Of Counsel

APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit

No. 12,600

ALLEN F. BARKER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARMEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALAN SCOTT TUCKER, Individually and in Behalf of All Those Similarly Situated,

Appellants,

versus

WENDELL G. HARDWAY, President of Bluefield State College; J. I. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and WEST VIRGINIA STATE BOARD OF EDUCATION, a Public Body Corporate,

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SIDNEY L. CHRISTIE, *District Judge.*

(Argued August 26, 1968. Decided September 3, 1968.)

Before:

HAYNSWORTH, *Chief Judge,* and
WINTER and BUTZNER, *Circuit Judges.*

PER CURIAM:

After the appellants, students at Bluefield State College, violently protested the policies of the college's administrative officers, they were suspended. The district judge refused to order their reinstatement setting forth his reasons in an opinion which we find to be supported by the record and to apply correct principles of law. *Barker* v. *Hardway*, 283 F. Supp. 228 (S. D. W. Va. 1968).

We believe the district judge correctly concluded that the administrative appeals which the college afforded the students satisfied the requirements of due process of law. In any event, the district judge granted them a plenary, *de novo* hearing with counsel. It was upon evidence received at this hearing that he based his own findings concerning the conduct that led to their suspension. The proceedings in the district court render moot the students' contention that they were denied due process at the college level.

Affirmed.

Opinion of the United States District Court for the Southern District of West Virginia Bluefield Division

Civ. No. 1037

ALLEN F. BARKER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARMEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALAN SCOTT TUCKER, Individually and in Behalf of all those similarly situated,

Plaintiffs,

v.

WENDELL G. HARDWAY, President of Bluefield State College; J. I. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and WEST VIRGINIA STATE BOARD OF EDUCATION, a Public Body Corporate,

Defendants.

UNITED STATES DISTRICT COURT

S. D. WEST VIRGINIA,

BLUEFIELD DIVISION.

April 10, 1968.

CHRISTIE, *District Judge*:

STATEMENT OF THE CASE

On October 26, 1967, the plaintiffs, suspended students at Bluefield State College, filed a verified complaint in this court seeking to enjoin the defendants from continuing to

enforce their suspension. As is here pertinent, the complaint alleged that since the beginning of the September 1967 term, the plaintiffs and other students had conducted peaceful and non-violent protests, and that on October 14, 1967, approximately two hundred students participated in such a demonstration at the college football field to protest the alleged racially discriminatory practices of the college administration and for the alleged denial of First Amendment rights. Plaintiffs further alleged that they were suspended without notice of hearing and for the sole purpose of stifling peaceful protest activities of students at Bluefield State College in violation of their First and Fourteenth Amendment rights.

The defendants, by answer, denied that all the assemblages occurring since September 1967 were peaceful and non-violent, and alleged that several such demonstrations had been violent in nature and resulted in loss of property and personal injury and had seriously hampered, impeded and disrupted the functioning of the college. Specifically, defendants alleged that the October 14 demonstration became violent and involved attempts to do bodily harm to defendant Hardway and others, necessitating active police participation. Defendants further alleged that the suspension procedure utilized was justified as essential to the safety and welfare of the entire student body, faculty and property and the orderly operation of the college; that the letters of suspension were the only means of notification available, inasmuch as all efforts to contact plaintiffs were frustrated by their elusive conduct.

By stipulation and Order entered on January 2, 1968, the following issues were formulated:

I.

Whether the plaintiffs did, singly or in combination, or in concert with others, overtly engage in, or encourage or incite others to engage in, a non-peaceful or violent protest or demonstration at Mitchell Field Stadium on October 14, 1967, and if so, whether the degree of their activity or participation at or preceding such demonstration was such as to call for disciplinary action by the school administration, and if so, what?

II.

Whether those affected were given an opportunity to be heard before or after their suspensions, and if so, whether the procedures followed were adequate to meet the requirements of federal due process.

III.

What rules and regulations, if any, were promulgated for the government of the student body, on and off campus; when they became effective; what notice or publication thereof was given the student body; and whether they, by their terms, applied equally to both whites and Negroes, and whether they were administered and enforced by the school administrators as between whites and Negroes.

IV.

Whether the defendants, or any of them, took any actions during the year 1967 which denied plaintiffs their First Amendment rights to freedom of speech, assembly and petition for redress of grievances.

An evidentiary hearing on these issues commenced on January 2, 1968, and was concluded on January 12, 1968.

Decision was deferred pending preparation of a transcript of the evidence and the submission of briefs.

Findings of Fact

I.

A. Plaintiffs were students at Bluefield State College, a state-supported institution of higher learning, located in Bluefield, West Virginia. It is operated by, and is under the "control, supervision and management" of the West Virginia Board of Education.[1] Rule making authority is vested in the president and faculty subject to the approval of the board.[2] The college was originally established and operated as an all-Negro institution, but was desegregated soon after the 1954 Supreme Court school integration decision. Present school enrollment is 1530, of which approximately 60% is white and 40% is Negro. Student financial aid is distributed on the basis of 76% to Negro students to 24% to white students.

B. Alonzo Saunders, one of the plaintiffs and a leader in the student rights movement at the college, planned a student protest demonstration which was to begin during the half time of the homecoming football game at Mitchell Field Stadium on October 14, 1967.

C. The ostensible purpose of the student protest demonstration was to encourage Dr. Hardway, President of Bluefield State College, to grant the students more freedom and a greater voice in the administration of the college. However, it, in reality, culminated into an effort to

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[1] W.Va.Code, 18-2-13

[2] W.Va.Code, 18-14-1

embarrass, intimidate and denounce Dr. Hardway and Dean of Women Wanda Moore, two of the defendants.

D. Approximately two hundred students, the majority of whom were Negroes, demonstrated at half time by marching back and forth on the playing field, carrying placards and chanting themes denouncing Dr. Hardway and Dean Moore. That the half time demonstration which was conducted on the playing field was peaceful and non-violent is undisputed. We are primarily here concerned with what ensued thereafter.

E. Subsequent to the half time and after the game had resumed, the student demonstrators moved into the home stands and unsuccessfully attempted to persuade a group of white fraternity members to join in the protest. The demonstrators then moved to the section of the bleachers where Dr. Hardway, Mrs. Hardway and their guests, Dean Moore, Mr. Moore, several other members of the college staff and other spectators were seated, and continued to demonstrate by displaying their placards and chanting themes as they had done during the half time. They encircled the section in which Dr. Hardway and his guests were seated and deliberately obscured their view of the football game by holding a placard directly in front of their faces. Several of the faculty members and other spectators felt compelled to leave the game as the actions of the demonstrators became more harassing and menacing. Thereupon, the police, deeming it expedient to do so, escorted Dr. Hardway and Mrs. Hardway and the latter's father and mother from the stands. Mrs. Hardway and her mother left the stadium and the police escorted Dr. Hardway and his father-in-law across the end of the field to the visitors' side which was then virtually unoccupied.

F. While this was being done, one of the demonstrators spat into the face of one of the police officers; another, Albert Smith, called out, "Hardway, we're going to get you."

G. Soon after Dr. Hardway and his guest had taken their seats in the stands on the visitors' side, the demonstrators marched over and continued in their menacing conduct. With the exception of Donald Hill and Alan Tucker, all of the suspended students were identified as being active participants in the events on the visitors' side. Hill was identified as one of the demonstrators whose conduct on the home side prompted the police to escort Dr. Hardway and his guests from that side of the field.

H. On the visitors' side, Alonzo Saunders, Charles Newbold, Carmen Pilgrim, Sharon Smith, Thomas Malone, Allen Barker and Terry Miller were specifically identified as being among those urging that they charge the police officers who stood between them and Dr. Hardway. Shouts of "Put the girls up front, they won't hit them" were heard. The demonstrators eventually entered the stands where Dr. Hardway was seated, forcing the police officers to form a protective circle around him and to escort him entirely from the stadium. Alonzo Saunders was identified as the general in charge of this shameful episode. The demonstrators threw rocks and bottles as they left the stadium. One police officer was struck in the back by a rock. One demonstrator attempted to reach through the police circle and grab or strike Dr. Hardway.

I. The demonstrators followed Dr. Hardway and the police officers to the parking lot where his automobile was parked and attempted to prevent his leaving. An automo-

bile was driven in front of Dr. Hardway's to block its exit. The police had to force the driver to move. The demonstrators beat upon and rocked Dr. Hardway's automobile. One police officer was struck in the face by a rock, another was struck in the face by a demonstrator.

J. After the police provided for Dr. Hardway's exit, they had to form a defensive line to protect themselves from the demonstrators. The police officers, while being verbally and physically abused, were forced to back from the parking lot into the stadium.

K. Dr. Hardway was personally able to identify Allen F. Barker, Donald Steven Hill, Thomas Malone, Terry Miller, Charles Newbold, Carmen Pilgrim, Alonzo Saunders, Albert Smith and Sharon Maria Smith as nine members of the student demonstrators, either leaders or active participants in the demonstration that took place at the stadium after the half time. Some of these were also identified by the police officers. One, Terry Miller, was identified by a police officer, Sergeant Dalton, as a participant in the melee on the parking lot.

L. Approximately three hundred students engaged in a "sing in" on Dr. Hardway's lawn, located on the college campus, at about 12:30 A.M., October 16, 1967. The "songs" were of the same chants that had been used during the demonstrations on October 14. Dr. Hardway remained inside and observed Alan Tucker as the leader of the "sing in."

It is, therefore, specifically found as a matter of fact that all the suspended students except Alan Tucker did, following the football game half time, engage in, and en-

courage others to engage in, a non-peaceful and violent protest demonstration at Mitchell Field Stadium on October 14, 1967, which posed an imminent threat of danger to Dr. Hardway and others in lawful attendance at the game, in violation of the rules and regulations of the Bluefield State College, and that the degree of their activity and participation therein was such as to call for the invocation of disciplinary action against them by the school administration pursuant to such rules and regulations.

It is further found as a fact that while Alan Tucker, the other suspended student, was the leader of the "sing in" after midnight, to-wit, at about 12:30 A.M., October 16, 1967, on Dr. Hardway's lawn, located on the college campus, the exercise itself was unaccompanied by any violent or non-peaceful activity, and though it was obviously designed to further harass and annoy Dr. Hardway and was in violation of the rules of the school, it may have been permissible under the First Amendment. Tucker is given the benefit of the doubt and exonerated of blame for this incident as a matter of fact.

II

A. On Monday, October 16, 1967, prior to taking any action against the nine students identified as participants in the demonstration after half time at the homecoming football game and the one who had led the "sing in" previously mentioned, Dr. Hardway sent Dean of Men Joseph I. Turner and Dean of Women Wanda Moore to contact each and request them to come to his office. They were unable to locate any of the ten students in their scheduled classes or at their record places of residence. Dean Turner later found four of the male students participating in an-

other demonstration on the campus and requested each of them to go to Dr. Hardway's office. Each refused.

B. Being unable to get the ten students to come to his office, Dr. Hardway mailed suspension letters to each and notified their parents by telegram. The ten students were advised in the letters of the reason for the action, that they could have an appeal hearing before the Faculty Committee on Student Affairs, and how to request one.

C. Each of the ten suspended students formally requested a hearing before the Faculty Committee on Student Affairs.

D. The Committee notified each of the students of the specific charges against them, the procedures to be followed and the date and time for the hearing.

E. Six of the suspended students[3] appeared before the Committee and upon having their requests to be represented by legal counsel refused, read a prepared statement and refused to go on with the hearing.

F. Four of the suspended students[4] appeared and had a hearing. The Committee recommended reinstatement for two[5] and they were reinstated on January 2, 1968. The other two suspensions remain in force. Thus, Dr. Hardway accepted the recommendations of the Committee in each instance.

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[3] Charles Newbold, Thomas Malone, Terry Miller, Sharon Smith, Carmen Pilgrim and Alonzo Saunders.

[4] Albert Smith, Allen Barker, Donald Hill and Alan Tucker.

[5] Alan Tucker and Donald Hill.

G. The Committee extended further opportunities for a hearing to the six students who refused. Two other hearing dates were set for each of the six. None appeared for a hearing at any of the designated times.

H. Bluefield State College procedures in effect on October 14, 1967 provide that any student subject to disciplinary action may appear before the Dean of Men, Dean of Women, Faculty Committee on Student Affairs or the President upon request. When the Faculty Committee on Student Affairs is to consider a problem in which a student is involved, the student is notified of the specific charge against him; that he may bring with him to the hearing as an advisor a faculty member, a fellow student or his parents; that he may face his accuser; that he may produce witnesses; and the date and time set for the hearing.

I. The Committee consists of six faculty members, viz.: Dr. Cortez D. Reece (Negro), Mrs. Othello Jefferson (Negro), Mr. Randolph White (white), Mrs. Rita Hill (white), Miss Doris Rice (Negro) and Mr. Donald Craft (white). Thus, the composition of the Committee with reference to race is equally divided. Mr. Craft is its chairman.

It is, therefore, specifically found as a matter of fact that the plaintiffs were duly notified of their suspensions, the reasons therefor and were given an opportunity to be heard. Whether the procedures provided and followed were adequate to meet the requirements of due process is a question of law and it is dealt with elsewhere herein.

III

A. Dr. Hardway's administration began in July of 1966. A student handbook had not been printed for the academic years 1964-65 and 1965-66. Early in his tenure, Dr. Hardway assigned to Dr. S. E. Cary, Director of Guidance, the task of preparing a current student handbook which was to include, *inter alia,* disciplinary procedures. After Dr. Cary completed the task, it was sent to the printer early during the summer of 1967, but the printed copies were not delivered to the college until sometime during the first week of October 1967. They were immediately distributed to the student body. This handbook is identified in the record as "Plaintiffs' Exhibit B."

B. The handbook also sets forth the right of students to assemble, discuss, debate and to disseminate personal and group opinion; the right to initiate and conduct organizations and programs consistent with the institutional program of higher education and college policy and the right to use college facilities in accordance with college regulations. Also included is a code of conduct.

C. With the exception of the disciplinary procedures, the other matters set forth in the student handbook are essentially the same as contained in similar handbooks of prior years. Furthermore, the procedures were given by the Faculty Committee on Student Affairs to each and every student against whom disciplinary action was taken.

It is, therefore, specifically found as a matter of fact that the handbook identified as "Plaintiffs' Exhibit B" was in effect and was distributed to the student body prior to October 14, 1967; that the rules, regulations and disciplinary procedures contained therein, by their terms, applied to all

students equally; and that there was no discrimination proven against the school administration in the manner of their application and enforcement as between students or as between races.

IV

The record fails to disclose any preconceived policy or design by the West Virginia Board of Education or the administrative or faculty staff of the college to restrict or deny the plaintiffs or others similarly situated of their First Amendment rights, or any specific instance where any of the defendants attempted to do so. The numerous attempts by the defendants and other school administrators to establish communications with the student body and appeals for a list of grievances, the apparent recognition of the *de facto* Students Rights Committee, the numerous demonstrations on campus such as the student union sit in and the student demonstration while Arter Hall burned, all attest to the administration's desire to encourage rather than deny or restrict the students in the exercise of their lawful rights.

It is, therefore, found as a matter of fact that none of the defendants took any action during the year 1967 which denied, or had the effect of denying, plaintiffs any of their First Amendment rights to freedom of speech, peaceful assembly, or petition for redress of grievances.

Discussion and Conclusions of Law

I

The statement of general policies and regulations contained in the student handbook requires decorous, sober and upright conduct of every student both on and off the campus. It further interdicts conduct which fails to show

respect for good order, moral actions, personal integrity, rights of others, or for the care of property, and provides for disciplinary action against the offender. These are reasonable rules and generally recognized as necessary to orderly administration of schools and colleges. Their obvious purpose is twofold: (a) to protect the authority and administrative responsibility which is imposed on the officers of the institution, and (b) to provide a suitable climate to students for study and relaxation. Unless these officials have authority to keep order, they have no power to guarantee education. The power of the president of the college to oversee, to formulate rules and regulations, and to rule is a necessary element in order to provide and promote education. Hammond v. South Carolina State College, 272 F. Supp. 947 (D. C. S. C. 1967). In West Virginia, such power is specifically delegated by the Board of Education to the president and faculty. Moreover, these officials have an inherent general power to maintain order and exclude those who are detrimental to the student body and institution's well-being, so long as they exercise sound discretion and do not act arbitrarily or capriciously. Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Zanders v. La. State Board of Education, 281 F. Supp. 747 (D. C. W. D. La. 1968); Goldberg v. Regents, 57 Cal. Rptr. 463, 473 (Ct. App. 1st Dist. 1967).

Consequently, the judiciary must exercise restraint in questioning the wisdom of specific rules or the manner of their application, since such matters are ordinarily the prerogative of school administrators rather than the courts. Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (5th Cir. 1966); Due v. Florida A & M University, 233

F. Supp. 396, 403 (N. D. Fla. 1963); 47 Am. Jur. (Schools) Sec. 178, p. 430.

It is concluded as a matter of law that the described acts and conduct of the identified plaintiffs at Mitchell Field Stadium on October 14, 1967, far exceeded the bounds of a peaceful demonstration or protest for the correction of grievances; that the same were in clear violation of the rules and regulations of Bluefield State College, and that it, therefore, became and was the duty of the administrative authority of the college to take appropriate action and to invoke available disciplinary procedures then in effect against those responsible. Having so concluded, Dr. Hardway's action in issuing the suspension orders, with the right to the parties to appeal to the Faculty Committee on Student Affairs, was clearly within the recognized limits of his authority as the administrative head of the college. There thus being no abuse of discretion on his part in so doing, this Court is without authority to interfere. Buttny v. Smiley, supra; Zanders v. La. State Board of Education, supra; Goldberg v. Regents, supra.

We now reach the question of whether the appeal and hearing procedures provided and utilized were adequate to meet the requirements of due process of law.

II

Whatever the law might previously have been on the subject, the rule announced by the Fifth Circuit in Dixon v. Alabama Board of Education, 294 F. 2d 150, cert. denied 368 U. S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961), that due process under the Fourteenth Amendment requires notice and opportunity for a hearing before a student at a tax-supported college can be expelled for misconduct and

prescribing minimum procedural guidelines to be followed thereat, has since been generally accepted as correct by other courts. But the Court was most careful to note that its action in extending the aggrieved students the right to a hearing in that case was not to "imply that a full-dress judicial hearing, with the right to cross-examine witnesses," was contemplated, and in a further effort to avoid any possible misunderstanding of its ruling in this regard it went on to specifically and expressly limit and restrict the hearing procedure to one of a non-adversary nature. In so doing, it by appropriate language recognized the practical difficulties and detrimental effect a broader application of the rule would have upon the institution and students alike. I find no basis for disagreement with that ruling or its rationalization.

As has been shown in the findings of fact, after receiving their notice of suspension from Dr. Hardway, each of the ten students requested a hearing before the Faculty Committee on Student Affairs and after the Committee had notified each of the specific charges, the procedure to be followed and the date and time for the hearing, four appeared and received hearings. The other six appeared but refused to submit to hearings unless represented by counsel. Their requests for counsel being refused, no hearings were held. Thereafter, on two separate occasions, the Committee extended further opportunities for hearings to the six students but none appeared.

They cannot base their refusal to submit to a hearing upon the failure of the procedure utilized to comply with any state statute on the subject for there was none in effect at the time. Instead, they seek to find justification for their refusal in the due process clause of the Fourteenth Amendment. What is required to meet procedural

due process there appears to be controlled by the circumstances of each case. As was observed by Mr. Chief Justice Warren in Hannah v. Larche, 363 U. S. 420, at 442, 80 S. Ct. 1502, 1514, 4 L. Ed. 2d 1307, " 'due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." It thus has no universal application to all situations and, as the Chief Justice further pointed out, it has "traditionally been associated with the *judicial* process" (emphasis added), and whether it "requires that a particular right obtain in a specific proceeding depends upon a complexity of factors." Obviously the Committee here had none of the attributes of a judicial body, since its only function was to gather information and make recommendations which had no binding effect on the president and faculty or on the Board of Education. It was not represented by counsel.

Dixon was explicit, as previously noted, in pointing out that a student disciplinary hearing need not be a full-dress judicial hearing and interpretations thereof have also clearly negated such a concept. Due v. Florida A & M University, supra; Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967); Madera v. Board of Education, 386 F. 2d 778 (2d Cir. 1967); Zanders v. La. State Board of Education, supra; Cornette v. Aldridge, 408 S. W. 2d 935 (Tex. Civ. App.). And, as was pointed out in *Madera,* the right to counsel is not an essential ingredient to a fair hearing in all types of proceedings, citing as authority for the statement Mr. Justice Frankfurter's concurring opinion in re Groban, 352 U. S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376, where he commented,

> " • • • The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect

> as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend."

Thus the touchstones of the application of due process are reasonableness and fairness in view of all the facts and circumstances of the particular case. Due v. Florida A & M University, supra; Hannah v. Larche, supra. And it may be noted in passing that the law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been actuated by proper motives. 47 Am. Jur. 2d (Schools) Sec. 188, p. 435.

While it is true that Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 in re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) and Mempa v. Rhay, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), have expanded the Sixth Amendment's guarantee of right to counsel in criminal and semi-criminal cases, all involving the right of liberty, they have no application to matters purely of a civil nature, and some of the cases cited by counsel for the plaintiffs are not in point for that reason. It must be kept in mind that this is a civil proceeding and unless the right in such a proceeding can be read into the due process clause of the Fourteenth Amendment or found in some Act of Congress or administrative rule or regulation, it does not exist. Suess v. Pugh, 235 F. Supp. 661 (N. D. W. Va. 1965); Spears v. United States, 266 F. Supp. 22 (S. D. W. Va. 1967). I have been cited to no decision by the Supreme Court or any other court expressly extending the right of counsel to a student at a school disciplinary hearing and my own extensive research has

failed to reveal one. *Dixon* significantly failed to include it as a required safeguard in its enumeration of recommended minimum requirements; *Wasson* expressly declined to grant it under the facts and circumstances of that case. *Madera* and *Zanders,* although envisioning possible situations where the right might be required, avoided a definitive ruling on the point. There is a well-recognized rule of construction that where reasonable doubt exists as to the meaning of any law, or the relief sought is questionable, courts must act in view of their foresight of consequences. Thus courts must carefully determine and balance the nature of the private interest affected against the public interest involved, and this rationalization has undoubtedly influenced the judiciary in its reluctance to grant adversary judicial status to student disciplinary hearings. I share that reluctance. See 58 A. L. R. 2d (Annotation) Sec. 4, pp. 909-12.

I conclude, therefore, that in the circumstances of this case, the Committee did not deny the six aggrieved students due process by refusing their request for counsel. And this is true for still another reason. The Supreme Court recognized in Hannah v. Larche, supra, a case dealing with the validity of certain rules of procedure adopted by the Commission on Civil Rights forbidding the presence of counsel, that the determinative factor there was whether the proceeding was "investigative" or "adjudicative." If investigative only, the right does not obtain; if adjudicative, it does. Applying this criterion to the facts of the instant case, it is clear the aggrieved students were not entitled to counsel before the Faculty Committee on Student Affairs, since it unmistakably appears from the evidence and the handbook that its only function was to gather facts and make recommendations to the president and faculty who could accept

or reject them as they might choose. The adjudicative authority at the college rested at all times with the president and faculty and was never delegated to the Committee, as indeed it could not lawfully have been under state law.

Needless to say, the disposition thus made of the question does not mean that the six students are remediless in the premises. It simply means that in the circumstances of the case, they were not and are not entitled to legal representation before the Faculty Committee on Student Affairs by reason of the due process clause of the Fourteenth Amendment. If they be advised by their counsel that the college administrators have abused their discretion or have acted arbitrarily or capriciously, which in the context of the due process clause I do not find to be the case, they may relitigate the issue by way of mandamus in an independent action where all the rights and privileges of a litigant in an adversary judicial proceeding, including the right of legal representation, would be judicially afforded to both sides. This is the proper procedure to be followed in seeking relief for abuse of ministerial power or for arbitrary and capricious conduct of school officials. 12 M. J. (Mandamus) Sec. 14, p. 357; 47 Am. Jur. (Schools) Sec. 187, pp. 433-5; 58 A. L. R. 2d (Annotation) Sec. 4, pp. 909-12.

III

Having found no evidence in the record that the rules and regulations were not applied equally to both whites and Negroes at Bluefield State College by the school administrators, it is concluded as a matter of law that the plaintiffs have failed to sustain the burden of proof on the allegation of racial discrimination.

IV

True it is that enrollment in school does not mean the student surrenders any of his constitutional rights. But by the same token, that fact does not give him the right to abuse and harass the administrators of the institution or engage in conduct detrimental to its well-being or which may tend to deprive other students of the right to a peaceful atmosphere in which to pursue their ambition for an education. Nor can it be gainsaid that the plaintiffs and their fellow demonstrators had the right under the First Amendment to bring their grievances to the attention of Dr. Hardway and other college officials in attendance at the football game, though a more appropriate time and place could very well have been chosen, and the evidence is uncontradicted that they were permitted to freely exercise this right by marching, chanting, singing and displaying signs and placards on and around the field throughout the half time; but when they entered the stands when the game resumed and by abusive and disorderly acts and conduct, first on the home side and then on the visitors' side, deprived Dr. Hardway and others in lawful attendance of the right to see and enjoy the game in peace and with safety to themselves, they thereby exceeded this constitutional privilege and forfeited its protection. I have failed to find any case saying that the right of free speech and peaceful assembly carries with it the right to verbally abuse another or to threaten him with physical harm or to deprive him of his right to enjoy his lawful pursuits.

As was pointed out in Baines v. City of Danville, 337 F. 2d 579 (4th Cir. 1964), a case dealing with racial demonstrations, First Amendment rights "are not a license to trample upon the rights of others. They must be exercised

responsibly and without depriving others of their rights, the enjoyment of which is equally precious."

The acts and conduct of the demonstrators after the game resumed at half time were clearly non-peaceful and Dr. Hardway was fully within his rights in citing those he could identify for disciplinary action. In doing so, he did not violate any of their First Amendment rights.

The other incidents relied upon for First Amendment infraction were the deprivation of Robert Hayes to the use of the facilities of Payne Hall for approximately one month as a result of his living in the men's dormitory without registering or paying fees, contrary to the rules of the school; the attempt to deprive Florence Robinson of student financial aid on the charge that she misgraded another student's paper, and placing Carolyn Bratton, an off-campus student, on social probation (taking away her campus privileges except to attend classes), as defined in the student handbook. A careful examination of the evidence bearing on each of these incidents convinces me that the facts justified the action taken and that in each instance the action taken was clearly within the discretionary authority of the school administration. Furthermore, I find no support in the evidence to sustain the allegation of violation of First Amendment rights of any other student at any other time or place during the year 1967. In fact, it will suffice to refer only to the testimony of J. I. Turner (T-903-906), Dean of Men, who has been with the college since 1946, and the testimony of Richard A. Brown (T-1077-1079), Dean of Faculty, who has been with the college since 1952, for sufficient answer to this charge. In the circumstances of this case, I feel fully warranted in giving to the testimony of these widely known and highly respected Negro educators significant weight on this issue.

In conclusion, it should be observed that after listening to 5 days of testimony, examining 55 exhibits and reviewing an 1126-page transcript of the evidence, one thing stands out rather clearly and that is that we are not really confronted here with lack of integration nor discrimination between races nor denial of legitimate rights to freedom of speech and peaceful assembly, but rather with a conflict between certain students, white and Negro, on the one hand, and the college administrators, white and Negro, on the other, for supremacy in the field of school policy and school administration. In essence, this is the real issue in this case, and on this issue the welfare of other students, of the institution itself and of society generally, dictates that the truculent students must not prevail.

West Virginia Code §18-14-1

ARTICLE 14.

BLUEFIELD STATE COLLEGE.

§ 18-14-1. Continuation; change of name; management; rules and regulations.

The Bluefield State teachers' college, heretofore established and located at Bluefield, in Mercer county, shall be continued and shall be known as the "Bluefield State College." The educational affairs of the Bluefield State College shall be under the control, supervision and management of the joint boards of education.

The rules and regulations made by the president and faculty of said college for its general government, for the admission of students thereto and the standards of scholarship to be maintained therein shall be submitted to the joint boards of education for their approval.

The negro board of education in conjunction with the State board of education shall establish and maintain in the Bluefield State College, in addition to the departments already established, such other courses of study as may be expedient and practicable and shall prescribe the conditions for graduation therefrom and make rules for the conferring of degrees and for issuing the proper diplomas to those who complete such courses, as in the case of other State educational institutions. (1895, c. 40; 1908, c. 27, §§ 211-218; 1919, c. 2, § 151; Code 1923, c. 45, § 151; 1931, c. 7; 1933, Ex. Sess., c. 12; 1943, c. 80.)

From Plaintiff's Exhibit B

HANDBOOK FOR

MEN AND WOMEN

STUDENTS

[State of West Virginia emblem]

BLUEFIELD STATE COLLEGE

BLUEFIELD, WEST VIRGINIA

1967 - 1968

1968 - 1969

GENERAL POLICIES AND REGULATIONS

Conduct

Bluefield State College expects of every student decorous, sober, and upright conduct. A student is subject to the college rules and regulations as long as he is officially enrolled, whether he be on or off the campus. Any action on the part of a student which fails to show respect for good order, for moral actions, for personal integrity, for the rights of others, or for the care of property shall be cause for disciplinary action against the offender.

A student charged with a misdemeanor or a felony is automatically suspended from the college when the charge is made. He may not apply for readmission to this college, nor have his credits transferred elsewhere, until his case has been cleared through the courts.

No person charged with a misdemeanor or a felony shall be considered for admission to a regular or summer term of the college until such time as his case has been cleared through the courts.

A non-resident student who is suspended or dismissed for any reason whatsoever shall immediately leave the college campus. A resident student who is suspended or dismissed for any reason whatsoever shall be given a reasonable amount of time in which to leave the college campus. A suspended or dismissed student may not visit on the college campus, nor attend any college events or activities.

Hazing in any form is prohibited. The term "hazing" as here used is defined as: to subject to cruel horseplay; to harass or punish by the imposition of excessively heavy or disagreeable tasks; to frighten, scold, beat, or annoy by playing abusive tricks upon individuals.

Possession and/or consumption of alcoholic beverages and narcotics within the confines of the college campus is contrary to state and college regulations.

Possession and/or use of firearms, explosives, or any deadly weapon within the confines of the college campus is contrary to state and college regulations.

Gambling, fighting, and the use of profane or vulgar language within the confines of the college campus are contrary to state and college regulations.

Solicitation and selling of products and articles upon a state college campus is prohibited except when done by organizations, groups, or individuals directly connected with the college, and with approval of the college president.

Students will park their cars only in those locations designated as student parking areas.

Procedure Re: Conduct

1. Reports of irresponsible actions go to the Dean of Men and Dean of Women from those who observe them, with a copy to the President. The Dean of

Men or Dean of Women will file a report of the incident, on forms that have been provided, to the President—including action taken.

2. If the action taken is not considered sufficient, it will be referred to the Student Affairs Committee, and Dean of Men or Dean of Women will be instructed to take further action, according to the decision of the Committee.

3. If reports come directly to the Committee, the matter will be considered and the Dean of Men or Dean of Women will be instructed as to the action that is to be taken, with a copy of such instruction going to the President.

4. Recommendations for suspension or dismissal will be referred to the president.

5. Recommendations of the Committee are subject to review by the President.

6. Recommendations of the Committee to the Dean of Men or Dean of Women will be considered mandatory unless said Dean of Men or Dean of Women ask to appear before the Committee for reconsideration.

7. The Dean of Men or Dean of Women will state the action as recommended by the Committee in writing to the student, except in case of dismissal or suspension, with a copy going to the parent, to the President's Office and the Registrar's Office. If such action involves collection of refund of fees, the Business Office should also receive a copy.

8. Any student whose actions have been reported as not in the best interests of the College and whose actions warrant punitive measures may appear before the Dean of Men, Dean of Women, the Student Affairs Committee, or the President upon request.

9. The Student Affairs Committee will notify the student of when it will meet to consider a problem in which the student is involved. The student may have an audience with the Committee if he wishes.

10. It is assumed that teachers can handle problems arising within their classroom. In event that one is of a nature serious enough, or is of such consequence that it cannot be reasonably handled by the classroom teacher, the situation should be reported and handled according to the above-described procedure.

11. Directors of dormitories and the Student Union will have full authority to regulate behavior and prohibit use of such facilities, with the approval of the President, if rules and regulations are not followed. In lieu of use of this authority they will have the option of requesting the Dean of Men, the Dean of Women or the Student Affairs Committee to take action.

12. Social probation may be placed upon students with the restrictions imposed being defined by the Students Affairs Committee. The College will not give consideration for financial aid to a student on social probation, and participation in or attendance of social activities will not be permitted. Students on social probation are not permitted to hold offices in organizations, or to participate in any type of extracurricular activity.

Letter Sent to Each Petitioner

(Letterhead of Bluefield State College, Bluefield, West Virginia 24701)

October 16, 1967

Mr. Alonzo Saunders
401 Park Street
Bluefield, West Virginia 24701

Dear Mr. Saunders:

On October 14 at Mitchell Stadium, Bluefield, West Virginia, you engaged in the activities of a group which became riotous and menanced [sic] the well-being of spectators and a College official. Because of this action, you are immediately suspended *indefinitely* from this College.

If you wish, you may appeal this decision to the College Faculty Committee on Student Affairs by writing a letter to Mr. Donald Craft, Chairman of the Committee. You should see the Business Manager concerning the reimbursement of any fees due you.

While suspended from this College, you will not be permitted on the grounds or in the buildings.

Sincerely yours,

WENDELL G. HARDWAY
Wendell G. Hardway
President

WGH/vv

Copies: Parents
Mr. J. I. Turner, Dean of Men
Mr. Donald Craft
Veteran's Administration, Regional Office,
502 Eighth Street, Huntington, W. Va.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1968

No. 901

ALLEN F. BARKER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARMEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALLEN SCOTT TUCKER,

Petitioners,

vs.

WENDELL G. HARDWAY, President of Bluefield State College; J. I. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and WEST VIRGINIA STATE BOARD OF EDUCATION, a Public Body Corporate,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia

LEO CATSONIS
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

JEROME KATZ
Special Counsel
Ritz Building
Bluefield, West Virginia
Counsel for Respondents

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IN THE

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Whether the First and Fourteenth Amendments to the United States Constitution restrict or preclude officials at a state-supported institution of higher learning from initiating and conducting disciplinary proceedings against students who violate institutional rules and regulations by engaging in riotous and disruptive conduct which endangers the life, property, administration and well-being of the institutional community by any disciplinary procedure other than a formal trial type procedure.

STATEMENT OF THE CASE

In accordance with the usage adopted in the petitioners' brief, references will be made herein to the transcript of the evidence adduced in the federal district court (T. ____). In addition, due to the generality of the questions presented by petitioners and the inadequacy of their statement of the case, the respondents submit the following as a more realistic summary of the circumstances involved herein upon which the district court and Court of Appeals predicated their respective decisions.

The respondent, Dr. Wendell G. Hardway, was appointed President of Bluefield State College (BSC) by the State Board of Education and assumed that position in July, 1966 (T. 158, 309). Shortly thereafter, Dr. Hardway requested the academic dean to assist him in recruiting additional Negro teachers for BSC and, accordingly, Dean Brown conducted a concentrated recruitment program (T. 1062-1064). Also, inasmuch as a student handbook had not been printed for the previous year (T. 309, 1123), Dr. Hardway appointed the Director of Guidance, S. E. Cary, chairman of a committee to prepare a student handbook which would include disciplinary procedures not expressly covered in previous handbooks (T. 312; Respondents' Ex. 21).

Although there had been a student affairs committee at BSC for several years (T. 827, 903, 974), it was reorganized by Dr. Hardway in May, 1967 (T. 828, 953, 987), while the handbook was being prepared for printing (T. 991). As a result, the committee membership was increased from four to six members and

the administrative officers were replaced by teaching faculty members, one of whom had an academic specialization in the field of guidance counseling (T. 337, 951). The composition of this committee, with reference to race, was equally divided (T. 202).

The 1967-1968 academic year began in September, 1967, and the administration was plagued with problems from the beginning. Due to personnel shortages, it was necessary to close the Student Union earlier than was desirable to either the students or the administration (T. 879, 881). The student leaders were advised of the problem and assured that it would be remedied as soon as possible (T. 881, 882, 1072). Nevertheless, some students and two faculty members, Janet Hall and Emma Sue Phelps, protested by conducting sit-ins and prevented the closing of the Student Union even at the regularly scheduled time (T. 469-470, 882). Closing hours and scheduling of activities in the Student Union were governed by rules and regulations promulgated by a joint student-administration board (T. 877). This personnel problem was resolved around the first week of October (T. 880).

During freshman orientation week, respondent Joseph I. Turner, Dean of Men, observed some freshmen students on the campus with their heads shaved, and called a meeting of the upperclassmen who were residing in the dormitory to advise them that "hazing" violated State law and College regulations (T. 835, 836). The following day one of the petitioners herein, Allen Barker, went to Dean Turner's office and complained that five or six students had attempted to shave his head the night before in the dormitory and he had suffered an epileptic seizure (T. 831).

Barker identified his assailants from year-book pictures and Dean Turner made a report of the incident to the chairman of the student affairs committee (T. 833; Respondents' Ex. No. 7).

On September 8, a hearing was scheduled by the student affairs committee to investigate Dean Turner's charges and Barker appeared before the committee, identified his assailants, one of whom was petitioner Alonzo Saunders, the only non-dormitory student involved. Each of the students involved appeared and gave his account of the incident; Dean Turner also appeared and presented evidence. The committee reconvened on September 11 to take additional evidence and Marcella Haynes, student council president, appeared to advise the committee that the student body supported the cause of the students accused of "hazing" Barker. The committee reconvened on September 14 and again took testimony from the victim and the participants and recommended that the dormitory participants be denied residence in the dormitory for the remainder of the school year and restricted from entering the dormitory for that period. Since petitioner Saunders was not a dormitory resident and was enrolled under Title 38 of the Veterans Law subject to good conduct and performance, the committee recommended the incident be reported to the Veterans Administration with the stipulation that no action be taken regarding his benefits (Respondents' Ex. No. 14; T. 841, 934). Dean Turner complied with the committee's recommendation and advised the Veterans Administration by letter dated September 18 (Respondents' Ex. No. 1).

On September 11, a group of students conducted a demonstration protesting any punishment as a result of the "hazing" incident (T. 933), and that night held a meeting in the Student Union. Dr. Hardway, accompanied by Dean Brown, appeared and stood in the back of the room (T. 215, 1071, 1088). The students asked Dr. Hardway to come up to the platform and began interrogating him. The questioning was conducted in a hostile manner and was accompanied by laughter and acts of hostility (T. 1071). However, Dr. Hardway attempted to answer their questions and suggested that the students form a committee and present their grievances to the administration (T. 215).

On September 16, there was a fracas between the students of BSC and Concord College at a football game and Dean Turner, at Dr. Hardway's request, conducted an investigation (T. 842; Respondents' Ex. No. 8). Dr. Hardway gave Dean Turner a list of names of both Negro and white students and after his investigation Dean Turner wrote identical letters of warning to the Negro and white students involved (T. 845-852; Respondents' Ex. Nos. 9 and 11).

On September 29, Mr. Cecil Moore, an attorney from Philadelphia and alumnus of BSC, spoke to a group of students at an unscheduled, unauthorized meeting in the Student Union (T. 883, 884, 898, 899). The director of the Student Union had noted an unusual amount of activity that day and was rebuked when he attempted to learn if someone was to appear on the campus. It was not until later that day, after receiving a complaint from a student that the crowd was blocking access to the bookstore and gameroom, that he learned of the meeting (T. 884, 898).

After Mr. Moore's appearance at BSC the sit-ins continued at the Student Union and on the night of October 2, there was a fire in Arder Hall, the old gymnasium. While firemen were performing their duties, a large number of students were demonstrating nearby by cheering, singing and making speeches (T. 1072, 1073). At the request of the fire chief, Dean Brown dispersed the mob and then attended a meeting of a group of students at the Student Union who had expressed concern about somebody burning the girls' dormitory. These students made inquiries concerning police protection and at Dean Brown's request, a State Policeman assured the students and the dormitory matron that they would remain as long as was necessary to protect the building. (T. 1073, 1074).

Earlier that same day the student affairs committee had discussed the disturbances which had been occurring on the campus and, in an effort to ease the tensions, invited the Student Council President and others to an informal meeting. However, the following day a representative of the Student Council appeared at the committee meeting and presented a letter rejecting the invitation and advising the committee that all future correspondence between them would be in writing (T. 963, 964; Respondents' Ex. No. 12).

About this same time, Dr. Hardway wrote the President of the Student Council asking for a meeting between the administration and students at a time and place to be set by the students. Dean Brown delivered this letter to the Student Council President and thereafter Dr. Hardway was advised that the students would meet at their own convenience but no date or time was specified (T. 328, 1066). On October 5, at

10:00 a.m., without prior notice, the students appeared at Dr. Hardway's office and wanted a meeting with all administrative officials; Dr. Hardway immediately contacted them and told them to drop whatever they were doing and attend the meeting (T. 327, 922). The students were accompanied by a lawyer and recorded the discussion on a tape recorder (T. 124, 922, 923). This meeting lasted about 2-1/2 to 3 hours and the attitude and demeanor of the students was one of hostility and rudeness (T. 924, 1067). Although the students agreed to give Dr. Hardway a month to attempt to correct their grievances (T. 1028), two hours after the meeting the President of the Student Council and President of Interfraternity Council notified Dean Moore of the cancellation of all activities by their respective organizations until further notice. (T. 1043; Respondents' Ex. No. 20.)

Later, as a result of an accusation made by Carolyn Bratton at the October 5 meeting, Dean Moore, by memo, requested Carolyn to come to her office; Carolyn appeared with her attorney and the conference was conducted (T. 1023). Dr. Hardway requested a conference with this student but she refused to participate when Dr. Hardway declined to permit her attorney to be present (T. 127, 329). Thereafter, charges were filed with the student affairs committee against Carolyn Bratton and Alonzo Saunders. By letter dated October 10, the committee notified each of them of the specific charges and of their rights; Carolyn Bratton's hearing was scheduled for October 12 and Alonzo Saunders' for October 13 (T. 973; Petitioners' Ex. Nos. 3 and 10). Both appeared on their assigned dates and their attorneys accompanied them into the hearings (T. 961, 989, 990).

Throughout this entire period and for a full week prior to the October 14 homecoming football game, there were student demonstrations on the campus (T. 476, 482). These demonstrations included marches through classrooms which were in session (T. 476, 654, 655) and through the halls where classes were being conducted (T. 480, 656). The demonstrations created a tension and were interfering with classes (T. 1044), and there was a fear of violence from the demonstrations by other students (T. 994). The situation was such that the only three white residents of the girls' dormitory moved out (T. 185).

It was also during this period that Alonzo Saunders, a leader in the student rights movement, planned and organized a protest demonstration to be held on October 14, 1967, during the homecoming football game between BSC and Livingston College (T. 218, 489). Organizational and planning meetings were held both at Saunders' home and on the campus at BSC (T. 489). Placards denouncing Dr. Hardway, Dean Moore and the college administration were prepared at both Saunders' home and in the student council office at BSC (T. 491, 492).

On October 14, the student demonstrators met on campus in front of the girls' dormitory where they boarded buses, which were provided by either the student council or college, and were transported to the football stadium (T. 492). Upon arriving at the stadium, the students seated themselves in the student section, where they remained until half-time (T. 488, 489, 675). Just prior to half-time, approximately one hundred student demonstrators, many of whom carried placards bearing slogans such as "Protests",

"Hardway is a puppet, and Spangler pulls the strings", "Niggers ain't so bad", "Administration, who really started the fire", "Rights now", and "Hardway, we want no Moore Moore", assembled on the walkway in front of the bleachers [T. 675, Petitioners' Exs. 8 (a) through 8 (i)]. Each of the petitioners in this action carried a placard bearing one of the aforesaid slogans (T. 519). At half-time the students moved to the north end of the playing field and began the "protest demonstration" (T. 498, 499, 675). The demonstrating students, including all of the petitioners, marched down the field to the south thirty-yard line and faced the west bleachers, in which Dr. Hardway, his guests, Dean Moore, her husband, and other spectators were seated (T. 498, 499, 676). The demonstrators remained in front of the bleachers, displaying their placards and chanting slogans similar to those printed on the placards, for ten to fifteen minutes, and then returned to the bleachers (T. 499, 676). Admittedly, the actions of the student demonstrators up to this point, while perhaps not in good taste, were peaceful and non-violent.

Upon returning to the bleachers and after the football game had resumed, the student demonstrators, as planned, continued to demonstrate (T. 517). One hundred fifty to two hundred of the demonstrating students marched to a section of the "home" bleachers which was occupied by members of a white fraternity who were attending the game as a group and there continued to demonstrate for ten to fifteen minutes by chanting and waving their placards, blocking the fraternity group's view of the game and urging them to join in the demonstration (T. 499, 676, 924). When the fraternity group did not join in the activities, the

demonstrating students entered the section of the bleachers occupied by Dr. Hardway, Mrs. Hardway, Mrs. Hardway's mother and father, Dean Moore, Mr. Moore, other BSC staff members and spectators (T. 354, 783). They surrounded the Hardway party and continued to demonstrate. The students were chanting, singing and yelling at Dr. Hardway. Placards were held in front of the Hardway party deliberately obscuring their view of the game (T. 786). Albert Smith jumped directly in front of Dr. Hardway, yelled at him and held a placard bearing the slogan "Niggers ain't so bad" within several inches of Hardway's face. Dr. Hardway attempted to lean to the side so as to be able to see the game several times, but Smith followed with his placard (T. 354, 519, 687, 725). The students pressed closer and closer to the victims and their conduct became more harassing and menacing (T. 354, 677, 692). Several of the spectators sitting in the section felt compelled to leave (T. 354, 893, 1050). Dean Moore and her husband left because she was afraid and overwhelmed (T. 1050). After some ten to fifteen minutes, the police, observing that Dr. Hardway's guests were showing concern and because in their opinion a riotous situation was developing, deemed it expedient to escort Dr. Hardway and his guests from the game (T. 499, 500, 677, 692, 705, 725, 726, 783).

As Hardway and his guests were being escorted from the stadium some of the police officers unsuccessfully attempted to form a line and restrain the students who were surging after Dr. Hardway in a threatening manner to prevent them from reaching him (T. 677, 728). Albert Smith shouted "We'll get you Hardway" (T. 355, 368). Another demonstrator

spat into the face of Bluefield police officer Burnham (T. 678).

Upon reaching the stadium exit, Dr. Hardway and his father-in-law, after conferring with the police, decided to remain at the game, but to sit on the opposite side of the field, which was virtually unoccupied (T. 678). Mrs. Hardway and her mother, however, left the game. The police escorted Dr. Hardway and his guest to the opposite side and seated them about two or three rows up on the fifty-yard line. The police then formed a defensive perimeter around them, blocking the two entrances into the section in which they were seated (T. 678). The students followed Dr. Hardway to the opposite side and continued in their menacing conduct. They attempted to enter the stands and attack Hardway, but were prevented by the police from doing so (T. 679). Alonzo Saunders, who was identified by several persons either because they knew him or by reason of his attire, appeared to be the leader and he was urging the demonstrators to crash the police lines (T. 289, 346, 356, 366, 685, 716, 892). Shouts of "Put the girls up front, they [the police] won't hit them" were heard (T. 346, 766). The girls went to the front and were blocked by the police. Trooper Shade was repeatedly asked by one of the girls if he would hit a girl (T. 730).

The pushing, shoving and yelling continued. The language used by the students became vulgar and profane (T. 357, 731). Allen Barker was in the center of the group, and was pushing and urging the demonstrators to crash the police lines (T. 357, 360); Donald Hill was a participant in the actions of the demonstrators (T. 361); Thomas (T. J.) Malone was

locked arm-in-arm with two others and was urging the crowd to crash the police line and appeared to be intoxicated (T. 357, 360, 362, 685); Terry Miller was in the front line and appeared to be one of the leaders (T. 357, 685, 737); Charles Newbold remained in the front lines and was seen to shake his fist at Hardway and yell "We'll see you tonight Hardway" (T. 356, 357, 364, 737); Sharon Smith and Carmen Pilgrim were in the front ranks and made physical contact with the police (T. 357, 360, 365, 369, 736, 712); Albert Smith was active in the pushing, shoving and urging to crash the police line and in the parking lot melee (T. 360, 367, 742).

The demonstration continued throughout the entire second half of the football game. A few minutes before the game ended the student demonstrators entered the stands through sections not guarded by the police and surged toward Dr. Hardway (T. 680). The police were forced to take Hardway out (T. 730). They formed a protective circle around him and escorted Hardway and his father-in-law to the parking lot (T. 358). The students attempted to break the police circle (T. 680, 729). One demonstrator attempted to reach over Officer Dent's shoulder and either grab or strike Hardway (T. 680). Rocks and bottles were thrown at the police and Hardway by the demonstrators (T. 358, 681, 731). They shouted profanities and obscenities at both the police and Hardway (T. 358).

Upon reaching the parking lot, Hardway and his father-in-law got into his automobile, but before they could leave, one of the demonstrators jerked the door open. Hardway was able to pull it closed again and

locked it (T. 358). Another demonstrator attempted to prevent Hardway from driving away by bringing his car to a halt in front of him. The police had to make him move (T. 731, 732, 785). Other demonstrators crowded around Hardway's car and began to shake it and beat on it (T. 358, 731, 681, 800). The police were finally able to shove the demonstrators away and get Dr. Hardway on his way (T. 358, 681). During the disturbance on the parking lot, Officer Dent was struck in the face by a stone (T. 683); another demonstrator struck Sergeant Lee of the Bluefield Police Department in the face with his fist while attempting to take the officer's riot stick from him (T. 733). Trooper Shade was struck on the ankle by a rock and another trooper was struck by one of the demonstrators, a rather large man; Trooper Shade had to use his chemical mace on him (T. 733). Trooper Shade felt that his life was in danger (T. 757).

After Hardway's departure, the demonstrators attempted to separate the police officers and the officers were forced to take defensive action; this they did by forming two lines, one behind the other, back to back (T. 683, 684). There was sufficient room at both ends of the police line for the people to go around, had they wanted, but the demonstrators continued to attempt to break through the police line (T. 683, 684). At the first opportune moment, while being verbally and physically abused, the officers backed out of the parking lot and into the stadium, where their automobiles were parked (T. 735, 683, 684).

Both Trooper Shade and Officer Dent identified Terry Miller as one of the participants in the melee on the parking lot (T. 685, 686, 740, 746, 747).

Sergeant N. W. Dalton of the Bluefield Police received a radio call to go to the stadium parking lot to render assistance because of a disturbance there (T. 805). Upon arriving he saw Terry Miller, whom he had known since birth, in a very intoxicated condition and in a very belligerent mood [T. 739, 806, 807 (a), 807 (b)]. Miller told Dalton that his friend had been arrested and that he was going to take him from the police (T. 807 (a), 811). Miller had told others that a girl had been struck by a police officer (T. 748). Sergeant Dalton was finally able to get Miller under control and he turned him over to his (Miller's) brother-in-law (T. 809, 814). Several of the demonstrators threatened to overturn Sergeant Dalton's police car, but he was able to dissuade them (T. 814).

The police officers who were at the October 14, 1967, football game made no arrests because they did not have sufficient manpower or equipment to handle the situation (T. 691, 757).

About midnight Sunday night, October 15, 1967, Allen Tucker led approximately one hundred fifty students to Dr. Hardway's home and led a "serenade" on the lawn in front of the house. The "songs" were the same chants that had been used during the demonstration at the football game the day before (T. 370, 371).

On Monday, October 16, 1967, Dr. Hardway called a meeting of the administrative council and discussed the two demonstrations with them (T. 1075). Dr. Hardway was able to personally and positively identify nine of the students who had participated in the

demonstration after half-time that had become riotous and one person, Allen Tucker, who participated in the serenade. He directed Dean Moore to contact the two women students and Dean Turner to contact the eight men students and ask them to come to his office (T. 855, 1046). Neither Carmen Pilgrim nor Sharon Smith were in their scheduled classes or at their places of residence, and Dean Moore was unable to contact them (T. 1046). Dean Turner was unable to locate any of the eight men students in their regularly scheduled classes (T. 855-857). However, Dean Turner did find Allen Barker, Charles Newbold, Thomas Malone and Allen Tucker participating in a demonstration in front of Conley Hall, the Administration Building (T. 856). Dean Turner personally requested each of them to go to Dr. Hardway's office (T. 857). None honored the request.

Only after having made several diligent attempts to contact the ten students to have them come to his office and having failed in these efforts did President Hardway suspend the ten students, and send notices of the suspensions to them. Telegraphed notices of the suspensions were sent to their parents (T. 857, 1046).

The notices advised the ten students that they were suspended immediately, why they were being suspended, that they had the right to appeal their suspension, and how to proceed (Petitioners' Ex. Nos. 9, 24; Respondents' Ex. No. 3). All requested hearings before the Faculty Committee on Student Affairs (Petitioners' Ex. No. 25; Respondents' Ex. No. 2). Notices were mailed to each of the ten students formally setting forth the specific charges, the procedures to be followed and the dates set for the hearings.

Six of the ten suspended students appeared before the Faculty Committee on Student Affairs and demanded that they be permitted to be represented by an attorney. Upon being advised that they could not be represented by an attorney, each read a prepared statement and declined to continue with the hearing. (Petitioners' Ex. No. 15.) The remaining four students appeared before the Committee and had hearings. The Committee recommended that Allen Tucker and Donald Hill be reinstated and that the suspension of Allen Barker and Albert Smith remain in effect. (Petitioners' Ex. Nos. 11-14, 16-19.)

Notwithstanding that Thomas Malone, Terry Miller, Charles Newbold, Carmen Pilgrim, Alonzo Saunders, and Sharon Smith had refused to participate in a hearing before the Faculty Committee on Student Affairs, the Committee continued to make itself available to them for a hearing. (Respondents' Ex. Nos. 4 and 5.) Each of the six suspended students requested a hearing three times and then failed to appear on the hearing dates for hearing.

Thereafter, on October 26, 1967, the petitioners filed a verified complaint for preliminary and permanent injunctions seeking, *inter alia*, to enjoin the respondents from continuing to enforce the suspension of petitioners as students of Bluefield State College. Jurisdiction was purportedly invoked by virtue of Title 28, U. S. C. §§ 1331 and 1343, Title 42, U. S. C. §§ 1981, 1983 and 1985 (3), and the First, Fifth and Fourteenth Amendments to the United States Constitution. An evidentiary hearing commenced on January 2, 1968, and was concluded on January 12, 1968. The District Court deferred its decision pending prep-

aration of the transcript and submission of briefs and on April 10, 1968, in accordance with comprehensive and exhaustive findings and conclusions, dismissed the petitioners' complaint and cause of action (283 F. Supp. 228; Petitioners' Appendix, p. 3a).

ARGUMENT

Whether the First and Fourteenth Amendments to the United States Constitution restrict or preclude officials at a state-supported institution of higher learning from initiating and conducting disciplinary proceedings against students who violate institutional rules and regulations by engaging in riotous and disruptive conduct which endangers the life, property, administration and well-being of the institutional community by any disciplinary procedure other than a formal trial type procedure.

After reviewing the 1126-page transcript of the evidence and examining 55 exhibits, the district court, in an opinion containing comprehensive findings of fact and conclusions of law, dismissed petitioners' cause of action for lack of jurisdiction. Somewhat parenthetically, the Court also noted that it was rather clear the real issue involved did not stem from a denial of legitimate constitutional rights but was, in fact, a conflict between certain students and the college administrators "for supremacy in the field of school policy and school administration."[1] This conclusion is and was inescapable in view of the evidence of violence and disruptive activities that pervaded the campus community at BSC from the very outset of the 1967-68 term.

Notwithstanding, petitioners continue to pursue the elusive theories that they either had the right to do what they did with impunity and/or that they were

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[1]283 F. Supp. at 239.

entitled to a full-dress trial for their allegedly "criminal" behavior if caught; however, the invariable factor involved is that the evidence has conclusively established their involvement.[2] This resolution had to be made at the trial court level inasmuch as the evidence adduced herein relative to the activities of the petitioners at the ball game would tend to make the objective reader question the actual presence of the witness.[3] Of necessity, in the instant case, it was incumbent upon the district court to apply the accepted credibility tests and to evaluate the conflicting testimony in reaching its decision. *Post* v. *Boles*, 332 F. 2d 738 (4th Cir., 1964). Unless the petitioners could demonstrate that the district court's findings were clearly erroneous, the Court of Appeals was, of course, bound thereby. *Vanater* v. *Boles*, 377 F. 2d 898 (4th Cir., 1967); *Los Angeles Shipbuilding & Drydock Corp.* v. *United States*, 289 F. 2d 222 (9th Cir., 1961).

Obviously, it becomes imperative that petitioners' attack be focused upon Dr. Hardway and his account of the affair.[4] This approach, however, completely disregards the evidence of the corroborating witnesses who testified at the trial. There is no question that

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[2]It is interesting to note that petitioners have again ostensibly abandoned their broad claim of discrimination even though originally placing great reliance thereon for jurisdiction purposes as well as asserting it as the reason for the student unrest at BSC (Complaint, para. I; Petitioners' Brief, p. 7).

[3]The petitioners' witness Meadows would have the Court believe that the "children" were acting as "cheer-leaders" even though he characterized the activities as a "melee" (T. 1106, 1107).

[4]Dr. Hardway was the main target of the "student protest movement" inasmuch as it became quite obvious in the trial that his positive innovations were resisted by some faculty members and students at BSC (T. 469, 470, 882).

the petitioners' activity at the ball game caused the police to become concerned not only for Dr. Hardway's welfare but for their own (T. 757). In any event the petitioners are and were unable to impeach or discredit the evidence of the casual, disinterested witness' account of the episode.[5] It is also obvious that other spectators close to the "demonstration" surrounding Dr. Hardway either became offended or sufficiently concerned to compel them to move from the area. It is under these established circumstances that the defendants proceed.

As in all cases involving the question of what is or what is not due process, no hard and fast rule can be laid down. *Hannah* v. *Larche*, 363 U.S. 420 (1960); *United States ex rel. Drew* v. *Myers*, 327 F. 2d 174, 182 (3d Cir., 1964). It varies widely with the circumstances, *Jones* v. *Rivers*, 338 F. 2d 862, 874 (4th Cir., 1964), and thus, the search for a violation of the Fourteenth Amendment and its constitutional concept of due process must be an appraisal of all the circumstances in the differing factual situations. *Cafeteria & Restaurant Workers' Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886 (1961); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *United States ex rel. Martin* v. *Murphy*, 208 F. Supp. 562 (N.D. N. Y., 1962). These general principles find peculiar application in the instant case.[6]

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[5]Mr. Kersey observed the shoving and pushing as Dr. Hardway and his party were escorted out of the stands on the "home" side as well as on the "away" side (e.g., T. 783).

[6]It is, of course, necessary to examine the circumstances and atmosphere that prevailed upon the campus of BSC at the time of and prior to petitioners' suspension (e.g., T. 185, 476, 480, 482, 654, 655, 656, 994, 1044).

Dixon v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir., 1961), cert. denied, 368 U.S. 930 (1961), was the first significant case in which the federal "due process" provisions were applied to student disciplinary proceedings. The Court, at page 155, observed that the procedural requirements necessary to satisfy due process depended upon the circumstances and the interest of the parties involved and concluded that:

> " 'Whether the ex parte procedure to which the petitioners were subjected duly observed "the rudiments of fair play", * * * cannot * * * be tested by mere generalities or sentiments abstractly appealing. *The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.*' " (Emphasis supplied.)

Significantly, there was no violence involved in the *Dixon* case and, in fact, the Court noted that the misconduct for which the students were expelled had never been definitely specified. The evidence therein did not affirmatively show that all of the plaintiffs were jointly present at more than one of the several demonstrations—a sit-in at a lunch grill. Moreover, the State Board held an *ex parte* hearing and directed the college president to write letters of dismissal to the students even though he was not aware of the reasons therefor.

Thereafter, in *Knight* v. *State Board of Education*, 200 F. Supp. 174 (M.D. Tenn., 1961), thirteen students of Tennessee A & I University were suspended without notice or hearing by the University disciplinary committee after the students had allegedly been convicted on charges of disorderly conduct and while in jail in Mississippi. The disciplinary committee acted pursuant to a "mandatory dismissal" regulation of the State Board directed at any student convicted of a criminal offense involving personal misconduct. The students did not learn of the action until their return to Tennessee, some thirty or forty days later. The Court noted that the committee relied upon hearsay information which later proved to be false.[7] However, the Court observed that notice and hearing are not always required with respect to a student's actual conduct and, at page 179 of the opinion, stated:

> "* * * It may be conceded that a state college or university must necessarily possess a very wide latitude in disciplining its students and that this power should not be encumbered with restrictions which would embarrass the institution in maintaining good order and discipline among members of the student body and a proper relationship between the students and the school itself. *It may be further conceded that it is a delicate matter for a court to interfere with the internal affairs and operations of a college or university, whether private or public, and that such interference should not occur in the absence of the most compelling reasons.*" (Emphasis supplied.)

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[7]The committee's information was that plaintiffs had been convicted of breach of the peace; however, they were actually convicted of disorderly conduct.

In *Due* v. *Florida A & M University*, 233 F.Supp. 396 (N.D. Fla., 1963), plaintiffs were dismissed after having been found guilty of contempt of court. Shortly after their conviction, the students were telephoned by the dean and asked if they had received a letter calling for their appearance before the disciplinary committee. Each replied in the negative and returned to the campus to appear before the committee. The chairman read the letter containing the charges to each student; the committee questioned each student concerning the conviction and then gave the student the opportunity to respond. Following their dismissal, the students brought suit alleging that the notice and hearing were unfair and a denial of due process. The Court, using the criteria laid down in *Dixon*, *supra*, upheld the procedures of the university.

In the instant case, it is of particular significance that, prior to Dr. Hardway's appointment in June, 1966, there were no fixed, codified disciplinary procedures at Bluefield State College. Sometime during the 1966-67 school term, S. E. Cary, Coordinator and Director of Guidance, was assigned to prepare a student handbook and to formulate a disciplinary procedure to be used at Bluefield State College. (Petitioners' Exhibit B, pp. 22, 23 and Appendix, page 26a.) Thereafter, during the summer of 1966, the handbook was completed and sent to the printer. The printed copies were returned to Bluefield State College during the first week of October and were immediately distributed. It is therefore logical to assume that the petitioners were aware of the contents of the manual prior to October 14, 1967.

The petitioners' conduct at the Bluefield State College-Livingston game on October 14 has been set forth in some detail in the Statement of the Case, *supra*, and will not be re-examined here except in limited areas. However, it is of sufficient importance to reiterate that Dr. Hardway identified each and every petitioner and testified as to their individual participation in the melee that occurred subsequent to the half-time demonstration (T. 354-372). This evidence was corroborated in part by the testimony of one of the petitioners herein.[8]

On Monday, October 16, Dr. Hardway called a meeting of the Administrative Council to discuss the incident at Mitchell Stadium on October 14. He directed Dean Moore to contact the two female petitioners and Dean Turner to contact the seven male petitioners whom he had identified as participants in the melee and to request them to come to his office. Deans Moore and Turner were unable to locate any of the petitioners in either their scheduled classes or at their places of residence. However, Dean Turner found four of the petitioners participating in a demonstration in front of the Administration Building and requested that they go to Dr. Hardway's office. They refused to go.

Thereafter, Dr. Hardway mailed the notices of suspension to the petitioners based upon their riotous activities and advised them of their right to appeal to the Committee on Student Affairs. Although hearings were requested and made available on different occasions, only four of the petitioners availed them-

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[8]Carmen Pilgrim testified as to petitioner Saunders' particular involvement as well as to the presence of all the petitioners on the "away" side. (T. 489, 510, 517-520.)

selves thereof. Of the four, two of the original ten suspended students were reinstated by Dr. Hardway upon the recommendation of the Committee.

A recent case involving an analogous factual situation is *Wright* v. *Texas Southern University*, 277 F. Supp. 110 (S.D. Tex., 1967). In that case eight students alleged that they were being denied admission to the University because they were suspended at the end of the Spring term for their participation in several peaceable assemblies.[9] They further alleged that their suspension was violative of due process because they were not given notice and some opportunity for a hearing on the grounds for their suspension.

The Dean charged with the responsibility of administering student discipline at the university personally observed one of the plaintiffs, Wright, on the campus during a period of serious unrest and turbulence on the campus.[10] He requested the plaintiff and his companion to leave, but they refused to do so. He asked Wright to come to his office to talk with him about the incident but Wright never came. Later, the Dean made attempts to contact Wright by mail but could find no mailing address. Further inquiry as to Wright's address was to no avail and he withdrew from the University on May 2. Thereafter, he was

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[9]277 F. Supp. at 111. The evidence adduced at the hearing showed five of the plaintiffs to be scholastically ineligible for admission for the Fall term. Therefore, their claims were rejected as presenting no substantial federal question. The Court emphasized that no student has a constitutional right to remain in attendance at a public university irrespective of his academic performance.

[10]A previous violation of University regulations by Wright had been reported to the Dean in March.

notified by certified mail that he would not be permitted to re-enter the University.

The plaintiff Richards was also personally observed by the Dean exhorting students to block the entrance-way to a campus building so as to prevent entry by the faculty and students. A letter was sent to Richards asking that he report to the Dean but it was returned undelivered. Richards was notified after the close of the Spring term that he would not be permitted to re-enter the University.

The Court acknowledged that *Dixon* v. *Alabama State Board of Education, supra,* was the applicable law for that Circuit but did not find it squarely in point on the issues regarding notice and hearing as they were raised in the *Wright* case. The Court further acknowledged that the application of the notice and hearing requirement to colleges presented somewhat of a theoretical dilemma when the official in charge of student discipline was a witness to the students' misconduct. However, the Court was of the opinion that the official was not disqualified from making the determination of what disciplinary action was to be taken.[11]

The Court, in granting the defendants' motion to dismiss, at page 113, concluded:

> "I think this evidence clearly demonstrates that diligence was exercised in attempting to

[11]277 F. Supp. at 112, footnotes 1 and 2. The Court was also of the opinion that the procedure of summoning the student to the office, demanding an explanation, and deciding whether he was to be disciplined, in the context of the campus, was a procedure consistent with due process.

give proper notice to both Wright and Richards. Wright was given personal notice at a time when he was in the act of violating a valid University regulation. Certainly that situation itself should have impressed him with the necessity of compliance with the Dean's command to visit his office. Moreover, written communications were sought to be delivered to both Wright and Richards. Only because of their failure to comply with a valid University regulation was delivery of the communications unsuccessful. The Dean of Students, I am convinced, exercised his best efforts to inform these two students of the nature of the University's complaints against them. *I do not think more is required.* To now order defendants to reinstate these plaintiffs subject to holding a hearing on their grounds for suspension would, it seems to me, be tantamount to condoning the irresponsible attitude exhibited by these plaintiffs. It would be unreasonable indeed for this Court to hold that a University could not take disciplinary action against students who could not be contacted although diligent attempts were made, particularly where their whereabouts were not disclosed to the University in violation of a valid regulation. In a day where the population of some of our state colleges and universities now approaches that of small cities, where there is a decided increase in off-campus residency, and where there are in many instances no attendance rules imposed on the students, to require more of university officials than was done here, would in many cases render university officials 'powerless to command or rebuke the fanatic, the irritant, the malingerer, the rabble rouser.' (Court's emphasis.)

* * *

> "In conclusion, with respect to the activities of each of these students, as presented to this Court, the constitutional umbrella should afford no protection to those who choose to go out in the rain bareheaded."

Significantly, the *Dixon* Court, in affirming the *Wright* case on appeal, *Wright* v. *Texas Southern University*, 392 F. 2d 728 (5th Cir., 1968), practically adopted the district court's findings and conclusions *in toto* and ostensibly reappraised its earlier holding by noting that:

> "In Dixon v. Alabama, 5 Cir., 1961, 294 F. 2d 150, this Court held that in matters of disciplinary action a student attending a tax supported institution of higher learning is entitled to notice that he is charged with misconduct, including a statement of the charges alleged in justification of anticipated action against him. Moreover, the student must be given the names of the witnesses against him and must be informed of the nature of their proposed testimony. Lastly, he should be given *the opportunity* to present his defense, orally or in writing, after which the findings of the disciplinary body should be presented in a report available for his inspection. (Emphasis theirs.)
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> "This does not mean that the student is entitled to the formality of a trial, in the usual sense of that term, but simply requires that he must be given a fair and reasonable opportunity to make his defense to the charges and to receive such a hearing as meets the requirements of justice, *both to the school and to himself.* In short, the student at the tax supported institution cannot be arbitrarily disciplined without the benefit of the ordinary, well recognized principles of fair play. (Emphasis ours.)

> "It is equally well settled, we think, that by seeking admission to and obtaining the benefits of attending a college or university the student agrees that he will abide by and obey the rules and regulations promulgated for the orderly operation of that institution and for the effectuation of its purposes, State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S. W. 2d 822 (1942); Cornette v. Aldridge, 408 S.W. 2d 935 (Tex. Civ. App., 1966, er-for ref. n. r. e.)."

In *Jones* v. *State Board of Education of and for the State of Tennessee*, 279 F. Supp. 190 (N.D. Tenn., 1968), 70 students were notified by telegram and letter of their indefinite suspension and granted an opportunity for a hearing at a later date. The suspensions were predicated, *inter alia*, upon disturbances in the school cafeteria, arrest for off-campus disorderly conduct, disrespect for school authority, continual disruption of fellow students, abusive language to faculty and administration and participation in riots. Some of the disciplined students alleged violations of their rights of free speech, assembly and procedural due process. The Court reviewed the case on the basis of the facts in relation to the disciplinary procedure utilized by the university and, at page 202, observed:

> "* * * Disciplinary proceedings conducted by an educational institution are not to be tested according to the niceties of procedure required in a court of law. Inquiry into the technicalities governing burden of proof in civil or criminal trials is, therefore, irrelevant. This phase of the plaintiffs' argument resolves itself basically into an unfounded argument of semantics brought about by the use of the word 'readmit' by the F.A.C. In an administrative proceeding the 'demands of due process do not require a

> hearing, at the initial stage or at any particular point or at more than one point * * * so long as the requisite hearing is held before the final order becomes effective.' Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 61 S.Ct. 524, 536, 85 L.Ed. 624 (1941). In this case the requisite hearing was held before the final decision of indefinite suspension was made."

Balancing the interests involved, the Court, at page 205, concluded:

> "* * * While a state school must comply with these elementary principles of procedural fair play, it is not necessary that a university adopt all of the formalities of a court of law. To achieve its educational goals a university must maintain order, propriety, and discipline. It is axiomatic that the exigencies of university life require the formulation and enforcement of rules of student conduct, and a court of law will not interfere with this function when, as in this case, the university has proceeded in a manner that is fundamentally fair and reasonable."

See also, *Zanders* v. *Louisiana State Board of Education*, 281 F. Supp. 747 (W.D. La., 1968).

The *Jones* case, it is submitted, is virtually indistinguishable from the instant case and the logic applied therein reveals the Court's keen awareness that "due process" should not and cannot be equated with "judicial process"; to hold that prior notice and hearing as applied to one case is applicable to every case is to stagnate the due process clause. This, fortunately, is the approach the federal judiciary generally has followed and reveals the fallacy of petitioners' contention that a divergence of opinion prevails among the Circuits.

The record in the instant case is replete with the petitioners' refusal to cooperate, their rudeness, contempt of administrative policies and procedures as well as of the efforts manifested by the administration to communicate.[12] This attitude materialized into riotous conduct on October 14 at Mitchell Stadium. Notwithstanding the clear evidence of their gross misconduct at the football game, the petitioners continue to indulge themselves in the delusion that such conduct is protected by the First Amendment and the "chilling effect" any inhibition thereof would have upon the right of free speech. However, one who claims that this right has been abridged must show that he had a right to use the particular medium through which he seeks to speak. *Avins* v. *Rutgers, University of New Jersey*, 385 8F. 2d 151 (3d Cir., 1967).[13]

In *Buttny* v. *Smiley*, 281 F. Supp. 280 (D. Colo. 1968), several students were suspended for blocking an entranceway to a C.I.A. recruiter who was visiting the campus for employment interviews. The plaintiffs also contended there that the action of the University officials had a "chilling" effect on the First Amendment right of freedom of speech. The Court responded:

> "* * * What they said on the occasion in question is not the basis for the disciplinary proceedings; it is what they did. We hold that the First

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[12]T. 328, 963, 964, 966, 1018, 1020, 1066, 1071; Respondents' Exhibits Numbers 12 and 13.

[13]Id. at 153. "* * * True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum * * *."

> Amendment guarantee of freedom of speech, as it is related to plaintiffs' activities here, does not give them the right to prevent lawful access to campus facilities. We have been unable to find any case that holds that active, aggressive physical action may properly be characterized by the courts as free speech."

In *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D. N.Y., 1968), the plaintiffs invoked injunctive relief complaining, *inter alia*, against the "policy-making structure of the University," and the President's "unlimited and undefined" disciplinary powers. Plaintiffs therein also alleged the peacefulness of their demonstrations and asserted the "chilling effect" that defendants' disciplinary proceedings would have upon their constitutional rights. In an effort to cope with the disturbances resulting from the "sit-ins", President Kirk appointed a Committee on Disciplinary Affairs which, *inter alia*, formulated a rule that any student failing to appear before his dean for an initial determination of involvement should be suspended. Accordingly, plaintiffs were notified but did not comply. Instead, they asserted through counsel that the dean was acting illegally and proceeded to occupy a university building in another sit-in. Plaintiffs refused to appear in person and would only appear through their counsel and were thus suspended. The district court, in denying the injunction, observed:

> "Our highest Court has made clear in the labors of a long generation that the First Amendment's mandate protecting free expression 'must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.' *Bridges* v. *California*, 314 U. S. 252, 263 (1941). The

Court has insisted steadily on the 'principle that debate on public issues should be uninhibited, robust, and wide-open * * *.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). It has also made clear, however, the gross error of believing that every kind of conduct (however nonverbal and physically destructive or obstructive) must be treated simply as protected 'speech' because those engaged in it intend to express some view or position. E.g., *United States* v. *O'Brien*, ... U. S. ..... (1968); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 498 (1949); cf. *People* v. *Stover*, 12 N. Y. 2d 462, 240 N.Y.S. 2d 734, *appeal dismissed*, 375 U. S. 42 (1963). Similarly, the Court has rejected the notion that 'everyone with opinions or beliefs to express may do so at any time and at any place.' *Cox* v. *Louisiana*, 379 U. S. 559, 574 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966). Without such inescapably necessary limits, the First Amendment would be a self-destroying license for 'peaceful' 'expression' by the seizure of streets, buildings and offices by mobs, large or small, driven by motives (and toward objectives), that different viewers might deem 'good or bad,' *Cox* v. *Louisiana*, *supra*, at 567. * * *

* * *

"5. Having undertaken to thwart and obstruct the disciplinary proceedings in their inception, plaintiffs now pick their way through the procedures outlined by the Joint Committee on Disciplinary Affairs and contend that these deny procedural due process. The argument lacks merit for reasons which can be stated briefly:

"(a) Viewed generally, in advance of any specific problems that might arise in specific cases, the prescribed procedures, sufficiently

> sketched above, seem entirely fair and amply protective of student rights. They are not required, obviously, to duplicate the criminal trial process. Bearing in mind that the process which is 'due' may vary with the nature of the subject and the occasion, *Wright* v. *Texas Southern University*, 392 F. 2d 728, 729 (5th Cir. 1968); *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150, 155-56 (5th Cir.), *cert. denied*, 368 U. S. 930 (1961); *Wasson* v. *Trowbridge*, 382 F. 2d 807, 811-12 (2d Cir. 1967); *Barker* v. *Hardway*, 283 F. Supp. 228, 236-37 (S.D. W. Va. 1968); *Buttny* v. *Smiley*, 281 F. Supp. 280, 288-89 (D. Colo. 1968), the court perceives no valid basis whatever for the abstract criticisms plaintiffs tender."

The notion that the First and Fourteenth Amendments afford the same protection to "conduct" as it does to "pure speech" has been vigorously and forthrightly rejected by this Court in recent cases e.g., *Adderley* v. *Florida*, 385 U. S. 39 (1966). Moreover, this Court has specifically stated that protests in the form of mass demonstrations and the like give rise to legitimate state concern in order to prevent public disorder and violence. *Walker* v. *Birmingham*, 388 U. S. 307 (1967).

Admittedly, the pivotal point in *Walker* was the violation of an injunction; however, this Court acknowledged the duty and authority of proper officials to act in order to prevent violence and disorder. As applied to the instant case, in view of the previous violence and disruptive activities occurring at the College from the beginning of the September term, it was logical to assume that campus conditions would further de-

teriorate upon class resumption.[14] Thus, notwithstanding that the petitioners' conduct at the football game was, in and of itself, sufficient basis for the discipline in the instant case, under these circumstances, it also became the duty of the College officials to consider the safety of the students as a communal group as well as the protection of the property committed to their charge. In this regard, school officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the courts. *Tinkler* v. *Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa, 1966), affirmed 383 F. 2d 988 (8th Cir., 1967), cert. granted, 390 U. S. 942 (1968). Unless officials have authority to keep order, they have no power to guarantee education, *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (D.S.C., 1967),[15] and it cannot be denied that these officials have an inherent general power to maintain order on campus and exclude those who are detrimental to its well-being. *Buttny* v. *Smiley, supra; Goldberg* v. *Regents of University of California*, 57 Cal. Rptr. 463, 473 (1967). Moreover, even the public character of BSC did not grant the plaintiffs a license to engage in activities

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[14]This materialized into the Sunday night, October 15, "sing-in" on the lawn of Dr. Hardway's home until the early hours of the morning and the Monday, October 16, disruptive mass demonstration on campus (T. 370, 371).

[15]*Id* at 949. "* * * To be sure, this is a tax supported institution, but this does not give license to chaos, or the hope to create chaos. The majority of the taxpayers who established, through representative government, the institution, and all the taxpayers who support this institution, have a vested interest in a peaceful campus, an academic climate of order and culture. * * *"

which disrupted the facilities or which interfered with the rights of other students to pursue their particular goals.[16]

Although *Dixon* v. *Alabama State Board of Education, supra,* required notice and hearing, the Court noted that the "nature of the hearing should vary, depending upon the circumstances of the particular case,"[17] and need not be a full-dress judicial hearing. As can be observed from the *Dixon* decision, the Court did not expressly require that the students be permitted the presence of legal counsel at their hearing. This approach is in accord with the weight of authority on the nature and extent of student disciplinary hearings. *State ex rel. Sherman* v. *Hyman,* 180 Tenn. 99, 171 S. W. 2d 822 (1942), cert. denied, 319 U. S. 748 (1943); Annotation: 58 A.L.R. 2d, *Student-Discipline-Rights to Hearing,* 903, 906-7 (1958).

This concept is reinforced by *Knight* v. *State Board of Education, supra,* in which the rule enunciated in

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[16]"I know of no legal principle which protects students on campus from the consequences of activities which would be violations of law if undertaken elsewhere. This is the law, but we are now confronted with a problem which is not solved by mechanical application of the criminal law: the problem of readjusting campus life to the new attitudes and demands, and of coping with the disaffections which afflict so many students.

"Here again, perhaps it is a beginning to separate student activities which are nonviolent from those which involve assault or damage to persons or property. Where the law violation is nonviolent or technical (such as blocking entrance to a campus building, or even orderly occupancy of a university facility), there may be sense in patient forbearance despite the wrong that the action involves. But violent activities, in my judgment, should be regarded and treated as intolerable. * * *" Fortas, *Concerning Dissent and Civil Disobedience,* p. 92 (Signet, 1968).

[17]294 F. 2d at 158.

the *Dixon* case was adopted and applied. However, as noted earlier, the Court in *Knight* was quick to point out that the right to notice and hearing depended upon the exigencies of the particular controversy and that, in some instances, a prompt dismissal without notice or hearing was necessary in order to protect the college from dishonor and discredit as where the student had been convicted in a court of law of serious misconduct. If, according to *Knight*, in some instances the student has no right to notice and hearing before dismissal, it defies logic to infer that the student has an absolute right to legal counsel when a hearing is afforded. Further, the theoretical extension of "due process" propounded by petitioners would turn every disciplinary proceeding into a full-scale criminal trial.

There are other recent decisions which, although they require a hearing and notice of charges in advance before a student's suspension (in the usual case), declare that the hearing need not be of a full-scale judicial nature. *Due* v. *Florida A & M University*, 233 F. Supp. 396 (N.D., Fla., 1963); *Woody* v. *Burns*, 188 So. 2d 56 (D.C. App. Fla., 1966); see also, Comment, 3 Ga. S. Bar J. 101 (1966). The *Due* decision, in analyzing *Dixon* in this regard, observed that:

> "A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full-scale judicial trial be conducted by a university disciplinary committee *with qualified attorneys either present or formally waived* as in a felonious charge under the criminal law." (Emphasis supplied.)

In another recent decision, *Goldberg* v. *Regents of*

University of Cal., 57 Cal. Rptr. 463 (1967), the First District Court of Appeals of California also adopted and applied the *Dixon* rules as to sufficiency and notice of a disciplinary hearing at which students attending a public university were suspended. In that case the Court upheld the suspension as the Court determined that all the mandates of the *Dixon* rules were observed. However, in that case it is noted that it was voluntarily suggested and advised by the University to the students that they might wish to obtain counsel for their suspension hearings although there is no comment in the decision that it was necessary for the disciplinary board to so permit the students the presence of counsel. The Court then analogized attendance by a student at a publicly financed institution of higher learning as being a benefit somewhat akin to that of public employment. If such an analogy is valid, it should be pointed out that in the field of public employment there is no absolute right to presence and representation by counsel at an administrative hearing on the dismissal of a public employee.

In *Suess* v. *Pugh*, 245 F. Supp. 661, 665 (N.D. W. Va., 1965), a case involving the dismissal of a probationary public employee, it was pointed out by the Court that:

> "The right to legal counsel must be found in the Constitution of the United States under the Fifth or Sixth Amendment or by some Act of Congress or some rule or regulation of an agency or administrative tribunal under which the individual functions. The Court is unable to perceive that there is any Constitutional right of counsel in a civil case or in a civil matter pending before an administrative agency. The right

> to counsel under the Sixth Amendment clearly applies to criminal cases only. Under the due process clause of the Fifth Amendment to the Constitution, the Court is unable to find any violations of due process by the denial of counsel in this case."

In accord, *United States* v. *Dicks*, 392 F. 2d 524 (4th Cir., 1968).

As the District Court in the instant case noted, the decisions relative to "right" to counsel are similarly inapplicable to hearings on the dismissal of students for misconduct.[18] This concept has been explored by one legal writer who observed that:

> "* * * Traditionally the determination of whether or not an action constituted a crime has been by reference to the procedure, jurisdiction, and the sanctions which follow, for it is only a crime if made so by law. 'A crime must be defined by reference to the legal consequences of the act' of which the person is accused. A complete exploration of the broad ramifications of this definition is unnecessary. *It is sufficient to say that in a university disciplinary proceeding the procedure followed is not criminal, the jurisdiction is not criminal, and the sanctions imposed are not criminal in nature. There is no holding out of the student to the public as an 'outlaw.'*"[19] (Emphasis supplied.)

See also, *Madera* v. *Board of Education*, 386 F. 2d 807 (2nd Cir., 1967), cert. denied, 390 U. S. 1028 (1968).

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[18]283 F. Supp. at 237.

[19]Johnson, *The Constitutional Rights of College Students*, 42 Texas L. Rev. 344, 349 (1964).

Moreover, misconduct for which a college student can properly be expelled from a college or university need not be of a type which is also considered public misconduct—hence a crime.[20] There is no criminal penalty in the eyes of the law for cheating on exams; disobeying curfew restrictions; or violations of other university-imposed restrictions. Further, suspension from college for misconduct in nowise is a deprivation of the personal freedom of the student. Thus, there is no reasonable analogy to be drawn from cases such as *In re Gault*, 387 U. S. 1 (1967), which involve crimes and deprivations of liberty, to the instant case.

Reliance has also been misplaced upon *Wasson* v. *Trowbridge*, 382 F. 2d 807 (1967), wherein a cadet at the United States Merchant Marine Academy was expelled and instituted suit to stay his expulsion. The

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[20]William G. Cole made the interesting observation that:

"There has been a historic concordat between town and gown, due to which members of a university or college have always enjoyed a certain immunity from the civil authorities. Students apprehended by local police *flagrante delicto* have traditionally not been arrested and brought to trial but rather turned over to the dean for his discretionary discipline. * * * What students are now saying is that they no longer want to be treated so, no longer want the college or university to be *in loco parentis*. They are not, they say, minors but majors and they demand all of the privileges appertaining thereto.

"But this means that they must also accept the responsibilities that accompany the rights. If deans can no longer serve as parent surrogates, if academic administrators must act in all respects like the civil authorities, then there will inevitably be increasing resort to these authorities. To be blunt, the college will 'call the cops'. *Student misdemeanors will no longer be dealt with in camera with wide discretionary powers exercised by the dean but in court with counsel.* Convictions will became a part of the student's permanent and public record, not kept in a confidential dean's file, regarded as youthful pranks to be forgotten and forgiven." (Emphasis supplied.) 54 American Bar Association Journal 159 (Feb. 1968).

Court remanded the case for an evidentiary hearing to determine whether or not the petitioner was denied due process since he alleged the hearing was unfair and that he was not permitted the presence of legal counsel. It is enlightening to note the precise language of the Court in that case:

> "Wasson most strenuously has urged that he was entitled to representation by counsel at one or both of the challenged hearings. We disagree. The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events of March 30th should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel. * * *"

The Court then commented upon the *Dixon* case and noted:

> "* * * It is significant that in the *Dixon* case where the balancing of government and private interests favored the individual far more than here, the court did not suggest that a student must be represented by counsel in an expulsion proceeding."

Ostensibly, the "right" to counsel in disciplinary cases theoretically engenders the right to be warned thereof. However, the respondents herein, as was the Court in *Buttny* v. *Smiley, supra,* are unaware of any

legal authority that requires college officials in disciplinary proceedings to advise a student to remain silent or to be provided with counsel. Moreover, the experience at BSC militates against a rule requiring counsel.[21]

Notwithstanding petitioners' contentions to the contrary, the law as well as the concerns of students and state colleges regarding student disciplinary matters has remained relatively stable throughout the years. Even prior to *Dixon* v. *Alabama State Board of Education, supra,* it was established that a state college could discipline a student for misconduct so long as the actions were not unreasonable, arbitrary, oppressive, capricious or discriminatory. This is the law today.

Admittedly, within the last ten years the courts have looked to the Fourteenth Amendment to determine whether the disciplinary action of the college authorities was lawful and the federal courts have generally been utilized to make this determination. Of necessity, each case has been judged solely on its own facts to determine whether fair play has been accorded with due consideration being given to the duty imposed upon college officials to take appropriate action in the interest of the protection of life and property and the rights of others to also receive an education. The issues in the instant case were thoroughly litigated and the appropriate federal standards were applied in the

[21]The students at BSC became so legal conscious that students demanded that counsel accompany them to informal meetings with faculty members (T. 329, 1023), committee meetings (T. 125), and there were so many attorneys around at several times that at least one administrative member couldn't "remember who they were" (T. 922).

district court; the Court of Appeals agreed. The task of demonstrating error remains unperformed by the petitioners.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia

LEO CATSONIS
Assistant Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia

JEROME KATZ
Special Counsel
Ritz Building
Bluefield, West Virginia

Counsel for Respondents

APPENDIX

RESPONDENTS' EXHIBIT A

Chapter 72, Acts of the 1947 Legislature, passed March 7, 1947; in effect ninety days from passage. Approved by the Governor.

This Act repealed Chapter 18, Article 2, Secton 2, of the Code of West Virginia, which section established a separate Negro board of education, thereby repealing the inconsistent provisions of West Virginia Code, Chapter 18, Article 14, Section 1, as set out in petitioners' Appendix, at page 25a.

AN ACT to repeal sections two, twelve, sixteen and seventeen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and to amend and reenact sections one, three, four, five and fifteen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the state board of education.

Article 2. State Board of Education.

Section
1. State board of education.
2. Repealed.
3. Meetings of state board; expenses of members.
4. Organization of state board; secretary.
5. General powers and duties.
12. Repealed.
15. Report to governor by state board.
16. Repealed.
17. Repealed.

Be it enacted by the Legislature of West Virginia:

That sections two, twelve, sixteen and seventeen, article two, chapter eighteen of the code of West Virginia, one thou-

sand nine hundred thirty-one, as amended, be repealed, and that sections one, three, four, five and fifteen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, be amended and reenacted to read as follows:

Section 1. *State Board of Education.*—There shall be a state board of education, to be known as the West Virginia board of education, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. The state board shall consist of ten members, of whom one shall be the state superintendent of schools, ex officio, who shall not be entitled to vote. The other nine members shall be citizens of the state, appointed by the governor, by and with the advice and consent of the Senate, for overlapping terms of nine years, except that the original appointments shall be for terms of one, two, three, four, five, six, seven, eight and nine years, respectively. At least one but not more than two members shall be appointed from each congressional district, and at least one member shall be of the Negro race.

No more than five of the appointive members shall belong to the same political party and not more than two members shall be graduates of the same institution of higher education. No person shall be eligible for appointment to membership on the state board who is a member of any political party executive committee or holds any other public office or public employment under the federal government or under the government of this state or any of its political subdivisions, or who is an appointee or employee of the board. Members shall be eligible for reappointment.

The governor shall appoint all members of the state board as soon after the effective date hereof as is practicable for respective terms of office beginning on the first day of July, one thousand nine hundred forty-seven. Any vacancy on the board shall be filled by the governor by appointment for the unexpired term. The terms of office of present members of the state board shall expire on the thirtieth day of June, one thousand nine hundred forty-seven.

No member of the state board may be removed from office by the governor except for official misconduct, incompetence, neglect of duty, or gross immorality and then only in the manner prescribed by law for the removal by the governor of state elective officers.

Before exercising any authority or performing any duties as a member of the state board, each member shall qualify as such by taking and subscribing to the oath of office prescribed by section five, article four of the constitution, the certificate whereof shall be filed with the secretary of state. A suitable office or offices in the state department of education at the state capitol shall be provided for the use of the state board.

Sec. 3. *Meetings of State Board; Expenses of Members.*—The state board shall hold at least six meetings in every year at such times and places as it may prescribe. It may meet at such other times as may be necessary, such meetings to be held upon its own resolution or at the call of the president of the board. The members shall serve without compensation, but every member shall be reimbursed from the general school fund for actual expenses incident to the performance of his duties, upon presentation of an itemized sworn statement thereof.

Sec. 4. *Organization of State Board; Secretary.*—At its first regular meeting in every year, the state board shall elect one of its members as president, who shall not succeed himself as president, and one as vice-president of the board. The state superintendent shall be the chief executive officer of the state board, and subject to its direction shall execute its policies.

The state board shall appoint a secretary and fix his salary, to be paid out of the general school fund upon warrants drawn by the state superintendent. The secretary shall keep a record of the proceedings of the state board and shall perform such other duties as it may prescribe.

Sec. 5. *General Powers and Duties.*—Subject to and in conformity with the constitution and laws of this state, the state

board of education shall determine the educational policies of the state, except as to the West Virginia university and Potomac state school, and shall make rules for carrying into effect the laws and policies of the state relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the distribution and care of free textbooks by the county boards of education, the general powers and duties of county boards of education, and of teachers, principals, supervisors and superintendents, and such other matters pertaining to the public schools of the state as may seem to the state board to be necessary and expedient.

Sec. 15. *Report to Governor by State Board.*—On the first day of October of each year, or as soon thereafter as practicable, the state board, through the state superintendent, shall make to the governor and to the Legislature a full report concerning the public schools and the educational institutions under its control and management, together with its recommendations in respect to needed legislation.

CERTIFICATE OF SERVICE

I, Leo Catsonis, Assistant Attorney General of West Virginia, a member of the Bar of the Supreme Court of the United States, and one of counsel for respondents, hereby certify that copies of this Brief in Opposition to the Petition for Writ of Certiorari have been served upon each of counsel of record for the petitioners herein by depositing the same in the United State Post Office, with first class postage prepaid, this 19th day of February, 1969, pursuant to the provisions of Rule 33 (1) of the Rules of the Supreme Court of the United States, addressed as follows: Roy Lucas, 20 East Ninth Street, New York, New York 10003; Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010; Herbert H. Henderson, 317 Ninth Street, Huntington, West Virginia, 25701; Norman Dorsen, School of

Law, New York University, Washington Square, New York, New York 10003; and Lewis M. Steel, 55 Central Park West, New York, New York 10023, counsel for petitioners.

LEO CATSONIS
Assistant Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1968

No. 901

ALLEN F. BARKER, *et al.*,

Petitioners,

—versus—

WENDELL G. HARDWAY, President of Bluefield State College, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS

ROY LUCAS
20 East Ninth Street
New York, N. Y. 10003

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

HERBERT H. HENDERSON
317 Ninth Street
Huntington, West Virginia 25701

Attorneys for Petitioners

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N. Y. 10003

LEWIS M. STEEL
55 Central Park West
New York, N. Y. 10023

Of Counsel

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REPLY BRIEF OF PETITIONERS

Respondents' brief raises two factual issues which should be clarified in order to aid the Court in evaluating the petition.

1. Respondents on pages 15 and 24 of their brief state that petitioners were suspended *ex parte* "only" after they either refused to come to President Hardway's office or could not be found. Respondents then develop a legal argument which attempts to justify suspension of students without a hearing who refused to make themselves available to college officials for the purpose of discussing allegations of disciplinary violations. Whatever the merits of this argument, respondents have simply misstated the facts. Four different Bluefield College officials testified that President Hardway sought out petitioners only for the purpose of having them pick up their letters of suspension (T. 854-855; 925-926; 1046; 1075-1076). Clearly, the students had already been judged *ex parte;* their alleged refusal to personally pick up their suspensions is irrelevant to the due process issues in this case.

2. Respondents' brief raises questions of fact concerning sit-ins, unauthorized meetings, fires, classroom disturbances, and the events which occurred after President Hardway left the football stands at the October 14th game. Yet President Hardway himself testified in the district court that "our concern was with the violence that occurred while we were in the [football] stands and has been" (T. 380). The answer was given after the President had been asked a series of questions which sought to determine the specific misconduct charged against petitioners. The letters of suspension themselves (30a) should have served to limit respondents' presentation of facts to the October 14th football game.

Respectfully submitted,

ROY LUCAS
20 East Ninth Street
New York, N. Y. 10003

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

HERBERT H. HENDERSON
317 Ninth Street
Huntington, West Virginia 25701

Attorneys for Petitioners

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N. Y. 10003

LEWIS M. STEEL
55 Central Park West
New York, N. Y. 10023

Of Counsel